

PREVENTING SEXUAL HARASSMENT IN THE
CONGRESSIONAL WORKPLACE: EXAMINING RE-
FORMS TO THE CONGRESSIONAL ACCOUNT-
ABILITY ACT

HEARING
BEFORE THE
COMMITTEE ON HOUSE
ADMINISTRATION
HOUSE OF REPRESENTATIVES
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PREVENTING SEXUAL HARASSMENT IN THE CONGRESSIONAL WORKPLACE: EXAMINING REFORMS TO THE CONGRESSIONAL AC- COUNTABILITY ACT

THURSDAY, DECEMBER 7, 2017

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to call, at 10:01 a.m., in Room 1310, Longworth House Office Building, Hon. Gregg Harper [Chairman of the Committee] presiding.

Present: Representatives Harper, Davis, Comstock, Walker, Smith, Loudermilk, Brady, Lofgren, and Raskin.

Also Present: Representatives Byrne, Brooks, and Speier.

Staff Present: Sean Moran, Staff Director; Kim Betz, Deputy Staff Director/Policy and Oversight; Katie Patru, Deputy Staff Director; Cole Felder, Deputy General Counsel; Dan Jarrell, Legislative Clerk; Erin McCracken, Communications Director; Jamie Fleet, Minority Staff Director; Khalil Abboud, Minority Deputy Staff Director; Eddie Flaherty, Minority Chief Clerk; and Teri Morgan, Minority Deputy General Counsel.

The CHAIRMAN. I now call to order the Committee on House Administration for purposes of today's hearing titled "Preventing Sexual Harassment in the Congressional Workplace: Examining Reforms to the Congressional Accountability Act."

The hearing record will remain open for 5 legislative days so members may submit any materials they wish to be included.

A quorum is present, so we may proceed.

I ask for unanimous consent that the Committee on Ethics Chairwoman Susan Brooks, Representative Jackie Speier, and Representative Bradley Byrne be afforded the opportunity to sit on the dais and question all of our witnesses today.

Without objection, so ordered.

At the outset, I would like to thank all of our witnesses for taking time out of what I know are very busy schedules to be here. We are much appreciative of that.

First and foremost, let me reiterate, there is no place for sexual harassment in our society, especially in Congress, period. And one case of sexual harassment is one case too many.

The Speaker of the House, Paul Ryan, tasked this Committee with heading up an extensive review on this issue, and we take that responsibility very seriously. As Members of Congress we must hold ourselves to a higher standard, a standard that dem-

onstrates that we are worthy of the trust placed in us by the public, by our constituents, and by everyone in this country.

Since our last hearing on November 14, additional accounts of sexual harassment have surfaced, and questions about the related settlements, both those authorized under the Congressional Accountability Act and outside that act, have been raised.

These issues suggest not only that it is time, but it is appropriate for the Committee to review the policy goals of the Congressional Accountability Act, review the processes set out in the act, what we need to do to accomplish those policy goals, and evaluate the reforms needed to accomplish our collective goal, our bipartisan goal of zero tolerance.

The Congressional Accountability Act has not been comprehensively reviewed since its enactment in 1995. The House took an important step forward last week in updating its policies and procedures by passing H. Res. 630. This resolution requires all House Members, officers, employees, including paid or unpaid interns, fellows and detailees to complete antiharassment and antidiscrimination training every year, as well as required all House offices to post a notice of employee rights and protections under the Congressional Accountability Act.

The logical next step is to conduct a closer review of the Congressional Accountability Act to identify and evaluate what reforms are needed to ensure that we are protecting all congressional employees and workplaces.

This hearing plays an important role in our Committee's extensive review, and the insight from our witnesses today will help inform us and help us make those policy choices.

I want to take this opportunity, again, to thank our Speaker, Paul Ryan, for tasking our Committee with this important issue. I would also like to thank the Ranking Member, Bob Brady, for his commitment to this issue and having the House work in a bipartisan matter. Not only is it essential, it is what people expect.

I look forward to hearing from each of our witnesses today. And with that, I will yield to the Ranking Member, Mr. Brady.

Mr. BRADY. Thank you, Mr. Chairman. And, Mr. Chairman, thank you for calling this hearing today and for the bipartisan manner by which you are approaching this issue.

I also want to thank our witnesses, especially from the House Employment Counsel and the Office of Compliance. I appreciate the professional and nonpartisan way you approach your jobs, and I thank you for being here for a second time.

The Congressional Accountability Act needs to be reformed. Since our last hearing, I have met with my colleagues and experts to better understand how we can improve this legislation. But most importantly, I have met with survivors of sexual harassment and assault.

Mr. Chairman, we need to improve this process. But most importantly, we need to change the culture of this place, and that change must start with us. I hope this hearing helps us find some agreement on what we must do and help us better understand how we can reform the Congressional Accountability Act and give victims more confidence in the process and justice for the terrible experi-

ence that they have endured. We owe it to our employees and the American people to get this right.

Mr. Chairman, I look forward to hearing from our witnesses. And I yield back the balance of my time.

The CHAIRMAN. Thank you, Mr. Brady.

Does any other member wish to be recognized for the purposes of an opening statement?

The chair will now recognize the gentlelady from Virginia, Mrs. Comstock, for the purposes of an opening.

Mrs. COMSTOCK. Thank you, Mr. Chairman. And, again, I appreciate your leadership and Ranking Member Brady and the bipartisan, bicameral nature with which we are approaching this. And I do really believe that this is a watershed moment, and we need to take this opportunity to really fundamentally change how we address this in Congress, but also beyond.

I thank my colleagues, Jackie Speier and Bradley Byrne, who are also joining us today, and I believe Susan Brooks, Chairwoman of the Ethics Committee, will be joining us, too.

Thirty years ago, a young woman, Dorena Bertussi, was the first victim of sexual harassment who brought this forward, highlighted this issue against a Member of Congress and prevailed in her case. She is here today and I want to welcome here and once again thank her for her courage and her perseverance and how gracefully she handled a terribly difficult situation then.

And I think it is important that now, even though it is far too long, and it shouldn't have been this long, that we do right by Dorena, but all the other people who are the people behind many of the headlines that we are seeing right now.

We see often the offenders and certainly we want to know about sexual predators because we know sexual predators cross all party lines, their actions transcend any party labels.

But we want to make sure that the victims are put first and foremost here, that we provide an advocate for them, whether it is a counsel or an ombudsman or some type of level playing field so the victims feel that we are protecting them, but also, more importantly, that we actually are, and that we make this a much more fair system, and also in that arena, how we address the nondisclosure agreements.

We know the nondisclosure agreements are often preventing us from really knowing what is going on there, whether it is allowing people in the past here in Congress to be able to come forward without any fear of violating their nondisclosure agreements or how we address it in the public sector in general.

I know there is legislation on that front too. So I think that is an important issue that we will need to address going forward.

So thank you for the opportunity here to have these expert witnesses. And particularly the EEOC did a report last year, which I found very helpful in terms of they were talking about changing the culture and how we do that by permeating from the top down, from the bottom up, and that this really needs to be something where we are all engaged and involved.

So thank you for the opportunity today to address this important issue.

The CHAIRMAN. The gentlelady yields back.

The Chair will now recognize the gentleman from Maryland, Mr. Raskin, for the purposes of an opening statement.

Mr. RASKIN. Mr. Chairman, thank you very much, Mr. Brady, thank you both for convening this very important hearing. And I want to thank our colleagues, Representative Speier, who has been in the forefront of the new changes that we are making, Congressman Byrne, and I think, also, Representative Brooks is coming or on the way.

We are in the middle, Mr. Chairman, of a dramatic culture shift that is a tribute to the women's movement in the United States and also to the strong political democracy that it is part of here in our country.

The public uproar over sexual harassment and sexual assault began in other places. It has rocketed across America. It came to the Halls of Congress and it has shaken this institution to the core.

But I am pleased that this is a moment when we are restating our common bipartisan commitment to zero tolerance for sexual harassment into a safe, dignified, and equal workplace for everyone who comes to serve Congress. And we are doing this on a bipartisan basis. We are doing this on a comprehensive institutional basis.

And I think that is the value that is being vindicated. This is a culture shift, much like ones Congress has gone through before. It used to be that lobbyists could give Members of Congress gifts and take them out for dinner and on fancy trips. And then there was a public uproar, a scandal. A rule has passed that banned it. And now it is unthinkable in this culture.

It used to be that Members of Congress could pocket money from their campaign funds when they retired. And there was a scandal, public uproar, a rule against it, and it is unthinkable that anybody would do that today.

We simply need to make sexual harassment something that is unthinkable, that just wouldn't be done within these Halls.

So that is the value. I think everybody agrees with it. What we need is a process that implements that value. And of course, the devil is in the details. We need rules that will strongly deter sexual harassment, and we need a process in place that will swiftly and fairly punish sexual harassment, address the situation of victims, and get to the facts of cases that are controverted until we really can move to a time when sexual harassment is simply no more in this body.

But I am glad that we are all part of this, we are going through this process, which is obviously painful for some members of this institution. But we have to leave sexual harassment behind the way we have left other sordid practices behind. And I am proud that the House Committee on Administration is playing a leadership role there and that we have so many colleagues who have come to join us in that project.

I yield back to you, Mr. Chairman.

The CHAIRMAN. The gentleman yields back.

Anyone else have an opening statement?

The Chair will now recognize Ms. Speier for the purposes of an opening statement.

Ms. SPEIER. Mr. Chairman, thank you. And I, too, applaud your efforts and the bipartisan manner in which we have undertaken this issue. To Ranking Member Brady, to my colleague Mrs. Comstock, and to my colleague, Mr. Byrne.

I think we are at a watershed moment, as you said, Mr. Chairman. You know, I have been working on this issue for a very long time, long before I came to Congress, as a matter of fact. In the mid-1990s, I was chair of the Women's Caucus in the State legislature, and we had a hearing on this issue. And we brought in Dr. Frances Conley, who was the first tenured neurosurgeon in the United States, and she was a professor at Stanford University. And she wrote a book called "Walking Out on the Boys," and talked about the horrific environment in which she had to work as a professional in academia and as a medical professional.

Of course, the Anita Hill hearings of 1992 was also a watershed issue and time when it was called the Year of the Woman. Well, it was 1 year, and that, frankly, was not enough.

So what we have experienced over the last many decades is that there has been a return to the status quo, which is woefully unacceptable. We all recognize now that the Office of Compliance is mandated to do things that really hurt the victim. It is not that they do it by choice, it is because that is how it is mandated in the Congressional Accountability Act.

H.R. 4396, which some of you have cosponsored, it now has over 110 cosponsors, it is Republicans and Democrats alike, it is the ME TOO Congress Act, which attempts to do the job of reforming the Office of Compliance. I don't think it goes far enough.

And as we continue to talk about this issue, I think we need to recognize that probably the House Ethics Committee or the House Administration Committee is not the venue to which investigations should be sent when a complaint is filed about sexual harassment. There needs to be an independent investigation.

Now, some have said: Well, how about the due process? And I would say, you know, there is due process here, and if we allow this independent agency or entity to do the review and make a recommendation to the House, that that would provide it.

I do think that we have to recognize that behavior like this is normally not just one incident. Normally it is a pattern of behavior. And I think we have got to make sure that however we move forward, that we are victim-centric. We have to recognize that many of these victims, one of whom sat in my office crying, said to me going through this process was worse than the sexual harassment itself. Shame on us for not having addressed this sooner.

But I want us to remember a young woman who came to this building, who worked in a number of offices. And it was in her second office where she filed a complaint for sexual harassment.

She is no longer here. Her career was over. She was told her career would be over if she filed a complaint. And she hasn't worked since.

We have got to make sure that the victims have the opportunity to stay here and work. They have a right to be able to work in these hallowed halls. Just because they were pawed by a colleague of ours or by a staff member is not a reason to then, if they file a complaint, to ostracize them.

So as we talk about this, I hope that we redouble our efforts to make sure that we are protecting the victim and that we are making sure there is a soft landing for them so they can continue to pursue a career in public service.

With that, I yield back.

The CHAIRMAN. The gentlelady yields back.

The Chair will now recognize the gentleman from North Carolina, Mr. Walker, for purposes of an opening statement.

Mr. WALKER. Thank you, Mr. Chairman. I appreciate the opportunity to be part of this Committee. And I think it says much that the Speaker has chosen your leadership and this Committee to handle a sensitive, but very important matter.

I think about the bravery of all the victims that have stepped forward. I believe Congresswoman Speier is exactly right, there is a pattern to this behavior, certainly much of the time. But it usually takes a champion or someone to step forward to begin to break through some of that, who is willing to come out. And we actually have one of those leaders in this courageous movement, Gretchen Carlson, with us today. So I just want to acknowledge her bravery over the last couple years in being a leader in this movement.

With that, I yield back, Mr. Chairman.

The CHAIRMAN. The gentleman yields back.

Any other person wishes to be recognized for the purpose of an opening statement?

I would now like to introduce our witnesses.

First, Victoria Lipnic was appointed as Acting Chair of the U.S. Equal Employment Opportunity Commission by President Trump on January the 25th, 2017. Before becoming the Acting Chair, Lipnic served as the Commissioner.

Acting Chair Lipnic has extensive experience working with Federal labor and employment laws, holding positions such as U.S. Assistant Secretary of Labor for Employment Standards and Workforce Policy Counsel to the Committee on Education and the Workforce in the U.S. House of Representatives.

Acting Chair Lipnic has also worked in the private sector as counsel to the firm Seyfarth Shaw LLP in its Washington, D.C., office.

We welcome you, Ms. Lipnic.

I would also like to introduce Susan Tsui Grundmann, Executive Director, Office of Compliance. Ms. Grundmann serves as Chief Operating Officer for the Office of Compliance, which was established to ensure the integrity of the Congressional Accountability Act of 1995 through programs of dispute resolution, education, and enforcement.

Ms. Grundmann also works with the Office of Compliance board of directors to advise Congress on needed changes and amendments to the Congressional Accountability Act.

Previously, Ms. Grundmann served as the Chairman of the U.S. Merit Systems Protection Board, enforcing Federal merit systems in the executive branch. She was confirmed to that position by the U.S. Senate in 2009.

Ms. Grundmann has more than 20 years of professional experience in litigation and in advising and educating clients in labor and

employment matters. She began her legal career as a law clerk to the judges of the 19th Judicial Circuit of Virginia.

Welcome, Ms. Grundmann.

Ms. Gloria Lett currently serves as Counsel to the Office of House Employment Counsel. Prior to serving as Counsel, Ms. Lett was a corporate attorney handling employment law issues and litigation for a large telecommunications company.

She also served as an Assistant Corporation Counsel representing the District of Columbia in civil litigation, as a Special Assistant United States Attorney for the District of Columbia handling criminal prosecutions, and as an attorney for the Equal Employment Opportunity Commission.

We welcome you, Ms. Lett.

Dan Crowley has served as counsel to the firm K&L Gates in the firm's Washington D.C. office since 2008. Prior to joining K&L Gates, for 5 years Mr. Crowley was chief government affairs officer at the Investment Company Institute, the national association of the mutual fund industry.

Previously, Mr. Crowley was vice president and managing director of the Office of Government Relations at NASDAQ Stock Market, Inc.

Mr. Crowley's earlier employment includes Counsel to this Committee, the Committee on House Administration; also the Committee on House Oversight and the office of Speaker Newt Gingrich.

We welcome you, Mr. Crowley.

The Committee has received each of your written testimonies, and you will each now have 5 minutes to present a summary of that submission. Of course, most of you have testified before or seen that, so you have the clock in front of you that will help you keep up with your time. It will be green for 4 minutes, then it will turn yellow for the last minute, and red means that your time has expired.

So, the Chair now recognizes our witnesses for the purpose of the opening statement, beginning with EEOC Acting Chair Lipnic. Thank all four of you for being here today.

STATEMENTS OF VICTORIA A. LIPNIC, ACTING CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; SUSAN TSUI GRUNDMANN, EXECUTIVE DIRECTOR, OFFICE OF COMPLIANCE; GLORIA LETT, COUNSEL, OFFICE OF HOUSE EMPLOYMENT COUNSEL; AND DANIEL F.C. CROWLEY, PARTNER, K&L GATES LLP

STATEMENT OF VICTORIA A. LIPNIC

Ms. LIPNIC. Thank you so much.

Chairman Harper, Ranking Member Brady, Members of the Committee, good morning and thank you for the opportunity to testify before you today about a subject that for weeks now has consumed headlines—sexual harassment—but certainly something that we at the EEOC have known to be far too common and which is only now being fully brought into the light.

Since early October, when news of what was then simply known as the Weinstein scandal broke, the issue of sexual harassment has

dominated the Nation's collective conversation. I am pleased to add my voice to that dialogue this morning.

By way of introduction, as the chairman said, I am Vicky Lipnic. I am the Acting Chair of U.S. Equal Employment Opportunity Commission. I have served as a Commissioner of the EEOC for the last 7½ years, and President Trump designated me Acting Chair in January of this year.

When I first joined the EEOC in 2010, I was struck by the number of harassment complaints the agency would see every year, the cases we would litigate, and the egregious behaviors we were addressing on behalf of victims of harassment.

I had a conversation with our then-Chair, the late Jackie Berrien, who asked me to dig deeper into this issue. I spoke with every one of our district directors around the country and each of our regional attorneys. I was astonished but also deeply concerned that to a person I was told the same thing. The EEOC could, if it wanted to, have a docket consisting of nothing but harassment cases generally and sexual harassment cases specifically.

This fact and a concern on a leadership level with the persistence and pervasiveness of the harassment claims we at the EEOC continue to see led to the establishment of the Select Task Force on the Study of Harassment in the Workplace, an outside group of experts that the EEOC convened following a public Commission meeting on workplace harassment in January 2015. I was honored to co-chair the select task force alongside my Democratic colleague, Commissioner Chai Feldblum, who joins me in the hearing room today.

The goal of creating the task force was to see if we could find new, innovative ways to address workplace harassment. We wanted to speak to and reinforce the work of prevention, not just address as an enforcement agency viability issues. The task force included members of both the management and plaintiff's bar, organized labor and trade associations, academics, including social scientists, compliance experts, and worker advocates.

Our work concluded in June 2016 with the release of the final co-chair's report, almost 30 years to the day after the United States Supreme Court handed down its landmark decision, *Meritor Savings Bank v. Vinson*, in which it held for the first time that sexual harassment was a form of unlawful sex discrimination. We took away a number of top-line lessons learned through the study of the task force which I would take this opportunity to share.

First, workplace harassment remains a persistent problem. Almost fully one-third of the approximately 90,000 charges received by the EEOC in fiscal year 2015 included an allegation of harassment. This includes charges of harassment on the basis of sex, race, disability, age, ethnicity, national origin, color, and religion.

Second, workplace harassment, particularly sexual harassment, too often goes unreported. In fact, the least common response to harassment is for an employee to take some formal action, either to report the harassment internally or file a formal legal complaint. These employees may not report harassing behavior because they fear disbelief or inaction on their claim, blame, or social or professional retaliation.

Third, an effective antiharassment effort must start at the top, and leadership and accountability are crucial. This cannot be overstated. Effective prevention efforts and workplace culture in which harassment is not tolerated must start at the highest level of management and an organization must have systems in place that hold employees accountable for this expectation.

Finally, training must change. Much of the training done over the last 30 years has not worked as a prevention tool. It has been too focused on simply avoiding legal liability. We believe effective training can reduce workplace harassment, but even that cannot occur in a vacuum. It must be part of a holistic culture of non-harassment.

And one size does not fit all. Training is most effective when tailored to the specific workplace and to different cohorts of employees.

I understand that the Committee is contemplating changes to procedures designed to address workplace harassment in the legislative branch. I am happy to offer my thoughts on these proposals.

In the interest of giving the Committee full background, my written testimony includes a lengthy discussion of the EEOC's procedures with respect to discrimination charges in both the private and Federal sectors.

I would also commend to the Committee a set of promising practices for preventing and combating workplace harassment that the EEOC recently published on our website and which have been provided to Committee staff.

In closing, I reiterate a key finding of our task force report: No system of training, monitoring, or reporting is likely to succeed in preventing harassment in the absence of genuine and public buy-in from the very top levels of an organization. We can and we must do better in all of our workplaces.

I am pleased to answer any questions you may have. And as you said, Mr. Chairman, I am a former House staffer myself, so I am very familiar with working in the legislative branch. Thank you.

[The statement of Ms. Lipnic follows:]

**TESTIMONY OF
THE HONORABLE VICTORIA A. LIPNIC
ACTING CHAIR, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON HOUSE ADMINISTRATION
“PREVENTING SEXUAL HARASSMENT IN THE CONGRESSIONAL WORKPLACE:
EXAMINING REFORMS TO THE CONGRESSIONAL ACCOUNTABILITY ACT”
DECEMBER 7, 2017**

Chairman Harper, Ranking Member Brady, Members of the Committee: good morning, and thank you for the opportunity to testify before you today about a subject that for weeks now has consumed headlines: sexual harassment – something many of us have known to be widespread and far too common, but which only now is being fully brought into the light.

Since early October, when news of what was then known simply as “the Weinstein scandal” broke, the issue of sexual harassment – what it is, how to prevent it, how to detect it, and how to deal with it when it is uncovered – has dominated the nation’s collective conversation. I am pleased to offer my thoughts and add my voice to that dialogue this morning.

By way of introduction, I am Victoria Lipnic, and I am presently the Acting Chair of the United States Equal Employment Opportunity Commission. I have served as a Commissioner of the EEOC since Spring 2010, when I was appointed to the Commission by then-President Obama. President Trump designated me Acting Chair on January 23, 2017, and I continue to serve in that role today.

Prior to my time at the Commission, I served as Assistant Secretary of Labor for Employment Standards for seven years in the George W. Bush Administration, and before that, as Republican Workforce Policy Counsel to the House Education and Labor Committee. As a former House staffer, I can say it’s usually more stressful to be in front of the dais down here, than behind it with you all up there.

When I first joined the EEOC in 2010, I was struck by the number of harassment complaints the EEOC would see every year, the cases we would litigate, and the egregious behaviors we were addressing on behalf of victims of harassment. I had a conversation with our then-Chair, the late Jackie Berrien, and she expressed the same concern and asked me to look into it.

I spoke with every one of our District Directors around the country (we have 15 district offices and a total of 53 field offices) and all of our Regional Attorneys. I was astonished, but also deeply concerned that, to a person, I was told the same thing: the EEOC could, if it wanted to, have a docket consisting of nothing but harassment cases generally, and sexual harassment cases specifically.

But, these offices also told me, we cannot simply bring more harassment cases each year, when we have many statutes we are charged to enforce, addressing all forms of discrimination on many different bases. This fact, and the concern on a leadership level with the persistence and pervasiveness of the harassment claims we at EEOC continued to see, led to the establishment of the Select Task Force on the Study of Harassment in the Workplace – an outside group of

experts that the EEOC convened under the leadership of our then-Chair, Jenny Yang, following a public Commission meeting on Workplace Harassment in January 2015. I was honored to co-chair the Select Task Force alongside my Democratic colleague, Commissioner Chai Feldblum.

The goal of creating the Task Force was to see if we could find new, innovative, ways to address what we at the EEOC knew was a pernicious and pervasive problem in America's workplaces. We wanted to speak to or reinforce the work of prevention, not just address, as the enforcement agency, liability issues.

In assembling the Task Force, we wanted to include legal experts with experience in workplace harassment, but also sought to cast a broader net, and reach beyond "the usual suspects" to bring in a range of views and disciplines. Ultimately, the Task Force included members of both the management and plaintiffs' bar; organized labor and trade associations; academics, including social scientists; compliance experts, and worker advocates.

We did not confine ourselves to simply those voices, however. Over the next fifteen months, the Task Force convened a number of hearings, many public, some closed, in which it solicited testimony from an even broader range of perspectives: experts in workplace investigations; academics who worked most closely with the data we have on workplace harassment; other government agencies who have worked to address harassment in their workplace; and experts in organizational leadership and management.

The work of the Task Force concluded in June 2016, with the release of the final Co-Chairs Report – almost 30 years to the day after the United States Supreme Court handed down its landmark decision, *Meritor Savings Bank v. Vinson*, in which it held, for the first time, that sexual Harassment was a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.

Our lengthy report includes our findings with respect to research and data; the economic business case to be made for rooting out harassment, even in the face of so-called "superstar" harassers; an analysis of workplace harassment "risk factors" which an employer can review to help gauge the risk of harassment in its workplace; a lengthy discussion of workplace harassment training – what works, and what plainly has failed to work; and a series of simple, practical "checklists" for employers wishing to assess their anti-harassment policies, reporting systems, and training.

We took away a number of "top line" lessons learned through the study of the Task Force, which I would take this opportunity to share:

First, workplace harassment remains a persistent problem. Almost fully one third of the approximately 90,000 charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment. This includes, among other things, charges of unlawful harassment on the basis of sex, race, disability, age, ethnicity/national origin, color, and religion.

Second, workplace harassment, particularly sexual harassment, too often goes unreported. Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure

the behavior. The least common response to harassment is to take some formal action - either to report the harassment internally or file a formal legal complaint. Employees who experience harassment may not report the harassing behavior because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.

Third, an effective anti-harassment effort must start at the top, and leadership and accountability are crucial. Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. The importance of leadership cannot be overstated - effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company. And at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation.

Finally, training must change. Much of the training done over the last 30 years has not worked as a prevention tool - it's been too focused on simply avoiding legal liability. I believe effective training can reduce workplace harassment, but even effective training cannot occur in a vacuum - it must be part of a holistic culture of non-harassment that starts at the top. Similarly, one size does not fit all: training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees.

I understand that the Committee is contemplating, among other things, changes to procedures designed to address workplace harassment that may be suffered by employees in the legislative branch, and I am happy to offer my thoughts on any such changes or proposals, as well as discuss EEOC's charge resolution procedures. In the interest of giving the members of the Committee full background, I discuss below the EEOC's procedures with respect to discrimination charges in both the private and federal sectors. While these procedures share the same fundamental purpose, they are considerably different in practice.

Private Sector Procedures

In the private sector, if someone feels they are the victim of discrimination, including unlawful workplace harassment, they can file a charge of discrimination with the EEOC. This charge sets forth the who/what/where/when and why of an allegation of discrimination. Depending upon the state in which they live, and whether or not there is an active state anti-discrimination agency in place, an employee must generally file a charge within either 180 or 300 days of the last act of discrimination. The charge is then served on the employer, who is invited to respond to it by setting forth its own position.

Prior to investigation, in many cases, if both the employee and the employer agree, a charge may be sent to mediation in an attempt to reach a voluntary settlement.

If the parties choose not to mediate, or if mediation fails, EEOC's field staff will then conduct an investigation. This may involve requests for documents and information; interviews with witnesses; and in some instances, the subpoena of information. Upon conclusion of its investigation, the EEOC will determine whether or not it has reasonable cause to believe unlawful discrimination has occurred.

If the EEOC does *not* find cause to believe the employer engaged in discrimination, an employee is given a “right to sue” letter, and may pursue his or her own remedies in federal court.

If the EEOC *does* find cause to believe discrimination has occurred, both parties are again invited to attempt to settle the case, via the conciliation process mandated in Title VII, our authorizing statute. Indeed, given that resolution of a charge before engaging in litigation is the statute’s preferred outcome, in cases where it may be deemed useful, EEOC will often engage in “pre-determination” settlement discussions, even before a cause determination is made.

If the parties are unable to come to resolution of the charge in the conciliation process, one of two things will happen: either EEOC will choose to litigate the case on behalf of the aggrieved party; or the agency will issue a right-to-sue notice and allow the charging party to pursue his or her own private relief in court. I stress for the Committee’s benefit that EEOC is not Legal Services – while we receive almost 100,000 new charges of discrimination each year, in the last fiscal year, with our given resources, we brought 184 federal lawsuits under all of the statutes we enforce, combined.

Federal Sector Procedures

In 1972, Congress gave the EEOC oversight over enforcement of non-discrimination laws covering the federal workforce. The Commission has established procedures for reporting and resolving harassment claims in the federal sector, which differ in some material ways from its private-sector procedures.

If a federal employee believes he or she is the victim of workplace discrimination, including harassment, the first step is for that employee to contact an EEO Counselor *at the agency where he or she works*. Generally, an employee must contact the EEO Counselor within 45 days from the date discrimination is alleged to have occurred. In most cases, an EEO Counselor will give an employee the choice of participating either in EEO counseling or in an alternative dispute resolution (ADR) program, such as a mediation program.

If the matter is not settled during counseling or through ADR, the charging party can file a formal discrimination complaint against the agency with that agency’s EEO Office. That complaint must be filed within 15 days from the date notice from an EEO Counselor about how to file a complaint is received.

Once a formal complaint has been filed, the agency will review the complaint and decide whether or not the case should be dismissed for a procedural reason (for example, a claim was filed too late). If the agency doesn’t dismiss the complaint, it will conduct an investigation. The agency has 180 days from the date the complaint is filed to complete its investigation.

When the investigation is finished, the agency will issue a notice giving an employee the choice to either request a hearing before an EEOC Administrative Judge, or to ask the agency to issue a decision as to whether or not discrimination occurred without a hearing.

If an employee asks the agency to issue a decision and no discrimination is found, or if the employee disagrees with some part of the decision, he or she can appeal the decision to EEOC or challenge it in federal district court.

If an employee wants to ask for a hearing, he or she must make a request in writing within 30 days from the day a notice from the agency about hearing rights is received. If a hearing is requested, an EEOC Administrative Judge will conduct the hearing, make a decision, and order relief if discrimination is found.

Once the agency receives the Administrative Judge's decision, the agency will issue what is called a final order which will state whether the agency agrees with the Administrative Judge and if it will grant any relief the judge ordered. The agency has 40 days to issue its final order, which will also contain information about the employee's right to appeal to EEOC, the right to file a civil action in federal district court, and the deadline for filing both an appeal and a civil action.

An appeal to the EEOC's Office of Federal Operations must be received no later than 30 days after receipt of the agency's final decision. EEOC appellate attorneys will review the entire file, including the agency's investigation, the decision of the Administrative Judge, the transcript of what was said at the hearing (if there was a hearing), and any appeal statements. The EEOC will then issue a decision on the appeal.

An employee can ask for reconsideration of the EEOC's decision, but must show that the decision is based on a mistake about the facts of the case or the law applied to the facts. Reconsideration must be requested no later than 30 days after receipt of EEOC's decision on the appeal (the agency also has the right to ask EEOC to reconsider its decision). Once the EEOC has made a decision on a request for reconsideration, the decision is final.

An employee must go through the administrative complaint process before he or she can file a lawsuit. There are several different points during the process, however, when the employee has the opportunity to quit the process and file a lawsuit in court, including:

- After 180 days have passed from the date a complaint was filed, if the agency has not issued a decision and no appeal has been filed;
- Within 90 days from the date the agency's decision on a complaint is received, so long as no appeal has been filed;
- After 180 days from the date an appeal was filed, if the EEOC has not issued a decision;
or
- Within 90 days of receipt of the EEOC's decision on an appeal.

Conclusion

As the Committee contemplates changes to Congressional anti-harassment systems and procedures, I am happy to offer myself, my staff, and our agency as a whole, as a resource to you. I would also commend to the Committee a set of “promising practices” for preventing and combatting workplace harassment that the EEOC recently issued and published on our website, which I believe have been provided to Committee staff.

In conclusion, I will return to touch on a key finding of the Report of the Select Task Force on Harassment, and offer this single piece of advice to the Committee: it was our conclusion that no system of training, monitoring, or reporting is likely to succeed in the absence of genuine and public buy-in from the very top levels of an organization. The effort and commitment of time and resources to an anti-harassment effort has to be REAL. Simply put, we have seen all too clearly how “training for training’s sake” – the stuff that makes peoples’ eyes glaze over, or serves only as the butt of jokes on sitcoms like “The Office” – simply will not be effective in combatting this scourge. We can, and we must, do better.

Thank you for your time this morning. I am pleased to answer any questions you may have.

The CHAIRMAN. Thank you very much, Ms. Lipnic.

The Chair will now recognize Ms. Grundmann for the purposes of her opening statement.

You are recognized for 5 minutes.

STATEMENT OF SUSAN TSUI GRUNDMANN

Ms. GRUNDMANN. Good morning, Mr. Chairman, Ranking Member Brady, and distinguished Members of this Committee and guests. On behalf of the Office of Compliance and our entire board of directors who join me here today, thank you for the opportunity to discuss our process and our concerns. We support and commend the efforts of this Committee and the Members of Congress for mandating workplace rights training for everyone and notice posting of those rights.

Over the last 6 weeks we have seen a triple-digit-percentage increase in the number of requests for in-person sexual harassment prevention training, a triple-digit-percentage increase in the number of staffers enrolling in our online training module, twice as many visits to our online information about how to report sexual harassment, a 12 percent surge in the number of people subscribing to our social media platforms to receive updates on rights and protections. And I am happy to report that posters notifying employees of their rights are flying off our shelf, with reorders arriving late last week.

These numbers tell us something. They mean that people are finally taking seriously a problem about which we have been sounding the alarm and have been proactively working to combat for years through our outreach and education program.

However, mandatory training and posters are the floor, not the ceiling. And even though Chair Lipnic notes in her statement that the training in the last 30 years has not worked as a prevention tool, we have over 20 years of nonmandatory training, and here we are today.

To reach the ceiling, not only should our process change, which we hope to discuss with you today, but as the chairman noted previously, publicly and forcefully, that the culture must change.

And that cultural shift includes not just changes to our process, but a shift, a policy, a sexual harassment prevention policy that is currently not mandated under the law. That policy should include examples of what constitutes harassment, reporting procedures, standards of conduct, investigations at the appropriate level, and accountability.

This discussion is proof that the members of this Committee in this watershed moment are focusing on an issue and validating our efforts to help build a strong culture of collegial respect.

Let me note, media reports have portrayed us as opaque, Byzantine, shrouded in secrecy. And while we understand that these comments are directed at our process and not to us as individuals, these comments, nonetheless, sully the reputations of the 20 women and men who faithfully report to our office every day for work, including our occupational health and safety inspectors who examine the Capitol Grounds for hazards in public access; including our Deputy Executive Director, who trained 500 people in person over the last 6 weeks, and not all at once, but in ones and twos

and tens; and including our only alternative dispute resolution counselor, who meets with employees at the beginning of the process to hear their stories, to advise them of their rights, and to comfort them in their distress.

This is the process that Congress designed in 1995, a process that not only demands confidentiality, but strict confidentiality under the law, a system we have been tasked to administer, a process that Congress is now seeking to change, and a change that we welcome. And we hope that we will play an integral role.

Many call this a moment of reckoning. We call it a moment of clarity, a clarity with respect to not what we do, but what we do under the Congressional Accountability Act.

And as you deliberate, we ask that you bear in mind that this is a new day, not just for Congress, but throughout the legislative community. The changes that you propose and implement should and must apply beyond the halls of Congress and to our entire legislative community.

During this time, our office stands ready and we will roll up our sleeves to assist you in the important work ahead.

Thank you. I look forward to your questions.

[The statement of Ms. Grundmann follows:]

**Prepared Statement of Susan Tsui Grundmann,
Executive Director,
Congressional Office of Compliance**

Mr. Chairman and Members of the Committee: On behalf of the Board of Directors and staff of the Congressional Office of Compliance ("OOC"), I thank you for this opportunity to participate in this Committee's comprehensive review of the Congressional Accountability Act ("CAA") and the protections that law offers legislative branch employees against harassment and discrimination in the congressional workplace.

More than thirty years ago, the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson* that workplace harassment was an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964. Twenty years ago, Congress enacted the CAA, which extends the protections of Title VII, as well as 12 other federal workplace statutes, to over 30,000 employees of the United States Congress and its associated offices and agencies, including the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Accessibility Services, and the OOC. Recent events, however, show us that sadly, we still have far to go to eliminate discrimination, harassment and retaliation from the nation's workplaces, including in the legislative branch. Workplace harassment on the basis of sex—as well as race, disability, age, ethnicity/national origin, color, and religion—remains a persistent problem.

I welcome the opportunity to provide this Committee with additional information about the CAA and the important role the OOC plays in educating the legislative branch on combatting workplace harassment and retaliation and providing victims a remedy when it occurs. I also appreciate the opportunity to discuss the Board's views on possible amendments to the CAA to make Capitol Hill a model workplace environment free from the effects of unlawful discrimination.

Overview

The OOC administers the CAA and performs the job of multiple agencies in the executive branch, including the Equal Employment Opportunity Commission ("EEOC"), the Department of Justice, the Department of Labor, and the Federal Labor Relations Authority. The OOC is an independent, impartial, nonpartisan office comprised of approximately 20 executive and professional staff and has a 5-member, part-time Board of Directors. Board members are appointed by unanimous consent of the majority and minority leadership of both the House of Representatives and the Senate. All of our current Board members are attorneys in private practice who were chosen for their expertise in employment and labor law.

Among other functions, the OOC is responsible for carrying out a program to educate and inform Members of Congress, employing offices, and legislative branch employees of their rights and responsibilities under employment laws made applicable to them through the CAA, adjudicating workplace disputes, and recommending to Congress changes to the CAA to advance the workplace rights of legislative branch employees. Thus, section 102(b) of the CAA tasks the Board of Directors to report to every Congress on: first, whether or to what degree provisions of federal law relating to employment and access to public services and accommodations are applicable to the legislative branch; and second, with respect to provisions not currently applicable, whether such provisions should be made applicable to the legislative branch.

Consideration of possible changes to the CAA, including its dispute resolution procedures, is also a critical component of this Committee's comprehensive review. As I discuss below, the Board strongly recommends that, in conducting its review, the Committee consider existing models under comparable statutes in the federal government when deciding what changes should be made to the dispute resolution procedures under the CAA.

The Board's Views on Possible Changes to the General Provisions and Scope of the CAA

Mandatory Anti-Discrimination, Anti-Harassment, and Anti-Retaliation Training for All Congressional Employees and Managers

The Board has consistently recommended in its past biennial section 102(b) reports that Congress mandate anti-discrimination, anti-harassment, and anti-retaliation training for all Members, officers, employees and staff of the Congress and the other employing offices in the legislative branch; and that it adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA. We commend the House and the Senate for their recent votes to require all Members, Officers, employees, including interns, detailees, and fellows, to complete an anti-harassment and anti-discrimination training program, as well as the House's vote to also require the posting of a statement advising employees of their rights and protections under the CAA. We remind this Committee, however, that the CAA applies across the legislative branch, and that these mandates do not extend beyond the two houses of Congress. We therefore recommend that any statutory change to the CAA include these broader mandates for the congressional workforce at large.

The CAA is a unique law and its processes and programs are tailored to the legislative branch workforce. The OOC has both the statutory mandate from Congress and the practical experience develop and deliver a comprehensive program of education under the CAA for the entire legislative branch community. Indeed, after years of

delivering in-person training, informational videos, and multimedia campaigns to combat sexual harassment, the OOC has seen a recent and notable jump in requests for our help: a triple-digit percentage increase in the number of in-person anti-sexual harassment training requests by offices; a triple-digit percentage spike in the number of staffers enrolling in online training modules; twice as many visits to the OOC's online information on how to report sexual harassment; and a significant increase in those subscribing to OOC social media channels and e-Alerts (12 percent) to receive updates on sexual harassment issues.

Mandatory training across the legislative branch on the CAA will provide an opportunity to prevent workplace problems from occurring in the first place. The OOC's current training program is not confined to the legal definition of workplace harassment, but further examines workplace conduct which, while not "legally actionable" in itself, may set the stage for unlawful harassment if left unchecked. Our training directly impacts behavior; congressional employees who understand their legal responsibilities will act more responsibly. A comprehensive training program continues to be one of the most effective investments employing offices in the legislative branch can make in preventing harassment and discrimination, reducing complaints and creating a more productive workforce.

Workplace harassment exacts a steep cost from those who suffer its mental, physical, and economic harm. The many legislative staffers who are entering the workforce for the first time are a particularly vulnerable population in particular need of education and awareness on their workplace rights. But workplace harassment can also impact the larger workplace through decreased productivity, increased turnover, and reputational harm. In short, mandatory training on the CAA will benefit the entire legislative branch workplace.

Mandatory training will also greatly benefit managers, who will not only obtain vital information on their workplace responsibilities under the CAA, but will also learn about workplace "best practices" and how to effectively handle discrimination and retaliation issues. Employing offices must understand the importance of curtailing objectionable behavior at the outset. Training can and does accomplish this goal. Leadership and accountability in this regard are critical. Employing offices must dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information—even before such harassment reaches a legally-actionable level.

It is also essential that employing offices in the legislative branch adopt and maintain comprehensive anti-harassment and anti-retaliation policies. We stand ready to work with employing offices through employment counsel to ensure that such policies, including clear instruction on how to complain of harassment and how to report observed

harassment, are communicated effectively to all employees. Employing offices must also be alert to any possibility of retaliation against an employee who reports harassment and must immediately take steps to prevent it. At all levels, across all positions, employing offices must have systems in place that hold employees accountable to these standards. Accountability means that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment are rewarded for doing that job well (or are penalized for failing to do so).

We need to have these conversations in offices all over Capitol Hill. We need to talk with managers about being vigilant, about nipping potential problems in the bud, about taking the time to investigate reports of offensive behavior, and about taking corrective action. It is a new day for combating sexual harassment. The OOC looks forward to working with employees, employing offices, and employment counsel to accomplish this important goal.

Although both the House and Senate have recently mandated discrimination and sexual harassment training, such training remains voluntary in other employing offices throughout the legislative branch. Much of the training done directly by employing offices fails to even mention the OOC as a resource for information or as the agency charged with resolving workplace disputes. To ensure universal awareness of workplace rights and responsibilities, the OOC recommends mandatory training on the CAA for every new employee and biennial update training for all employees and supervisory personnel. Mandatory training for all congressional employees and managers would go far in creating a model workplace free from harassment, discrimination and retaliation.

Congress also must devote sufficient resources to harassment prevention efforts to ensure that such efforts are effective, and to underscore its commitment to creating a workplace free of harassment. To meet this mandate, additional resources will be required, including additional trainers, a technical specialist to provide IT expertise and support, and an administrator to manage the increased demand in training for the 30,000 employees of the legislative branch.

*Require Notice-Posting of Congressional Workplace Rights in All
Employing Offices*

Workplace harassment too often goes unreported. Common responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, attempt to ignore, forget, or endure the behavior, or simply leave the workplace for another job. According to the EEOC, the least common response to harassment is to take some formal action—either to report the harassment internally or to file a formal legal complaint. The Board has long been concerned that employees in the

legislative branch may also be deterred from taking formal action simply due to a lack of awareness of their rights under the CAA.

The Board has therefore consistently recommended in its section 102(b) reports that Congress adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA. Although it commends the House for adopting resolutions requiring the posting of a notice advising employees of their rights and protections under the CAA, the Board recommends that the CAA be amended to require that all employing offices throughout the legislative branch post this notice of employee rights. Through permanent postings, current and new employees remain informed about their rights regardless of their location, employee turnover, or other changes in the workplace. The notices also serve as a reminder to employers about their workplace responsibilities and the legal ramifications of violating the law.

Although the CAA does require the OOC to distribute informational material “in a manner suitable for posting,” it does not mandate the actual posting of the notice. Exemption from notice-posting limits legislative branch employees’ access to a key source of information about their rights and remedies. Accordingly, the Board continues to recommend that Congress amend the CAA to adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA.

Name Change

The Board agrees with proposals to change the name of the OOC. The name “Office of Compliance” provides legislative branch employees no indication that it exists to protect their workplace rights through its programs of dispute resolution, education, and enforcement. As the Board advised Congress in 2014, changing the name of the office to “Office of Congressional Workplace Rights” would better reflect our mission, raise our public profile in assistance of our mandate to educate the legislative branch, and make it easier for employees to identify us for their needs.

Extending Coverage to Interns, Fellows, and Detailees

The Board supports proposals to extend the coverage and protections of the anti-discrimination, anti-harassment, and anti-retaliation provisions of the CAA to all staff, including interns, fellows and detailees working in any employing office in the legislative branch regardless of how or whether they are paid. Any amendment to the Act should ensure that these individuals are also covered by the anti-retaliation provision of section 207 of the Act – protections which are not reflected in pending House bills. (Unless otherwise noted, references in this statement to “employees” should be understood to refer to these unpaid individuals.)

Climate Survey

The Board supports the use of climate surveys to ensure that the congressional workforce is free of illegal harassment and discrimination. Because harassment and retaliation in the workplace is often underreported, official statistics underrepresent the extent of the problem. Many employing offices are working to address the problem of sexual harassment, but they lack the assessment tools to understand the scope or nature of the problem. Conducting climate surveys is a best-practice response to fill this gap in knowledge. These surveys can serve as a useful tool in assessing both the general knowledge of CAA workplace rights amongst legislative branch employees and the prevalence of discriminatory or harassing conduct in the workplace.

Climate surveys, however, must be carefully and professionally designed and implemented to be effective. The OOC currently does not have the staff, resources, or expertise to conduct such surveys. Although the OOC is certainly willing to provide its assistance should these surveys be mandated, such an undertaking by the Office would not be possible unless cooperation with the survey process is also mandated. In addition, the OOC would need to be provided with sufficient resources to contract with those who have the expertise to perform these tasks.

Whistleblower Protections

The Board has recommended in its section 102(b) reports, and continues to recommend, that Congress provide whistleblower reprisal protections to legislative branch employees comparable to that provided to executive branch employees under 5 U.S.C. 2302(b)(8), and 5 U.S.C. 1221. If the OOC is to be granted investigatory and prosecutorial authority over discrimination complaints (see below), the Board recommends that the Office also be granted investigatory and prosecutorial authority over whistleblower reprisal complaints, by incorporating into the CAA the authority granted to the Office of Special Counsel ("OSC"), which investigates and prosecutes claims of whistleblower reprisal in the executive branch.

The Board's Views on Possible Changes to the Current Dispute Resolution Procedures under the CAA

As stated above, the Board strongly recommends that the Committee consider existing models under comparable statutes in the federal government in its review of potential change to the dispute resolution procedures under the CAA. To assist the Committee in this important work, I will briefly summarize our current dispute resolution procedures below and convey the Board's considered views on suggested changes to them.

Current Procedures Under the CAA

Like most civil rights statutes, the CAA contains an administrative exhaustion requirement. Prior to filing a complaint with the OOC pursuant to section 405 of the Act or in the U.S. District Court pursuant to section 408, subchapter IV of the CAA currently requires that an employee satisfy two jurisdictional prerequisites: mandatory counseling and mandatory mediation. First, the employee must request counseling within 180 days of the date of the alleged violation of our statute. “Counseling” is a statutory term that equates to intake. The CAA also provides that “[t]he period for counseling shall be 30 days unless the employee and the Office agree to reduce the period.” Therefore, an employee can request to shorten the 30-day counseling period and is advised by our Office of that option. An employee may also waive confidentiality during the counseling period to permit the OOC to contact the employing office to seek an immediate solution to the employee’s concerns, but this is strictly up to the employee.

If a claim is not resolved during the counseling phase and the employee wishes to pursue the matter, the CAA currently requires the employee to file a request for mediation with the OOC. When a case proceeds to mediation, the employing office is notified about the claim and the parties attempt to settle the matter with the assistance of a trained neutral mediator appointed by the OOC. The CAA specifies that the mediation period “shall be 30 days,” which may be extended only upon the joint request of the parties.

The CAA currently does not grant the OOC General Counsel the authority to investigate claims alleging violations of the laws applied by subchapter II, part A of the Act, including claims of employment discrimination under Title VII of the Civil Rights Act of 1964. (See discussion below.) Therefore, if the parties fail to resolve their dispute in mediation, a covered employee may elect to proceed directly to the third step in the process, either by filing an administrative complaint with the OOC, in which case the complaint would be decided by an OOC Hearing Officer in a confidential setting, or by filing a lawsuit in a U.S. District Court, in which case the proceedings would be a matter of public record. By statute, this election—which is the employee’s alone—must occur not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. This statutory timing requirement creates a 30-day period—sometimes referred to as a “cooling off period”—before the employee can proceed.

A party dissatisfied with the decision of the Hearing Officer may file a petition for review with the OOC Board of Directors, and any decision of the Board may be appealed to the U.S. Court of Appeals for the Federal Circuit. If, instead of filing a request for an administrative hearing, the employee files a civil suit in Federal district court, an appeal of that decision would proceed under the rules of the appropriate U.S. Court of Appeals.

The Board's Views on Possible Changes to the Dispute Resolution Procedures under the CAA

Counseling and Mediation

Part of the Committee's review entails consideration of proposals that the CAA be amended, including proposals to eliminate counseling and mediation as jurisdictional prerequisites and instead make them optional. Other suggestions concern the confidential nature of those proceedings. To assist the Committee, the Board offers the following observations and recommendations:

The OOC Board is mindful of concerns that the CAA's mandatory counseling procedure may serve to delay the availability of statutory relief or to unduly complicate the administrative process. We nonetheless believe that voluntary OOC counseling can provide important benefits to many employees seeking relief through our office. OOC counselors often provide covered employees with their first opportunity to discuss their workplace concerns and to learn about their statutory protections under the CAA. Although we believe that counseling need not remain mandatory under the CAA, nor a jurisdictional requirement, we recommend against any amendment of the CAA that would eliminate the availability of counseling for those employees who voluntarily seek such assistance from our office.

The EEOC provides a valuable model. Although counseling is not mandatory under Title VII, the EEOC nonetheless offers analogous optional assistance to employees who want or need it. Thus, the EEOC's public website advises potential claimants that discussing their employment discrimination concerns with an EEOC staff member in an interview is the best way to assess how to address concerns and to determine whether filing a charge of discrimination is the appropriate path. Similarly, the Board believes that OOC counseling provides employees a valuable opportunity to discuss workplace concerns with an OOC staff member, to learn about their statutory rights and protections, and to gain assistance in processing their claims.

Under the CAA, the 180-day filing deadline is tolled by filing a request for counseling, not a formal complaint. If the CAA were amended to make counseling optional such that employee were not required to make a request for counseling, the CAA must be further amended to provide that the time limit for filing could also be tolled by filing a document similar to an EEOC charge. The EEOC requires that a claimant initiate the process by filing a formal charge. A charge of discrimination is a signed statement by an employee asserting that an employer engaged in employment discrimination. It is the formal request for the EEOC to take remedial action. An EEOC charge must be filed within the statutorily prescribed limit. A similar procedure could be incorporated into the CAA.

Further, the CAA, as amended, should expressly state that filing such a charging document is mandatory. A charging document facilitates framing the issues for subsequent proceedings, such as mediation, hearing, or investigation, should Congress provide the OOC General Counsel with investigative authority. See discussion below.

Moreover, requiring the filing of such a document with the OOC furthers the policy goal of parity between the laws made applicable to legislative branch employees through the CAA and the laws that apply in the private sector and executive branch. For example, in the private sector, an employee is required by statute to exhaust administrative remedies by filing a charge with the EEOC before filing a lawsuit under federal law alleging discrimination or retaliation. Similarly, under the Whistleblower Protection Act, individuals who allege that they experienced retaliation because of whistleblowing may seek corrective action in appeals to the Merit Systems Protection Board (“MSPB”) only after first filing a complaint seeking corrective action from OSC. The MSPB appeal may be filed only after OSC closes the matter or 120 days after the complaint is filed with OSC, if OSC has not notified the complainant that it will seek corrective action. Administrative exhaustion also can facilitate voluntary resolution of disputes by the parties themselves, and it can assist in identifying those cases lacking in merit, for example those where there is no jurisdiction under the CAA.

The Board also notes that under the CAA, only claims that are raised in counseling can be raised in an OOC administrative hearing or in a lawsuit in U.S. District Court. It can be difficult to determine which claims were raised in counseling because of the confidential nature of the counseling process, discussed below. The CAA could be amended to permit the OOC counselor to assist employees in the technical aspects of drafting the employees’ charging document, minimizing this problem in many cases. Granting OOC counselors this authority would also facilitate framing the legal issues and informing the Office of the matters to be investigated, should Congress provide the OOC General Counsel with investigative authority, as discussed below. Finally, granting OOC counselors this enhanced statutory role could serve to assist those employees who are unrepresented by legal counsel and who seek guidance and support in pursuing their legal claims.

The Board believes that the statutory term, “counseling,” has led to some public confusion on the nature of the OOC counseling process. For example, some have misunderstood the term “counseling” to entail a form of employee “therapy,”—thereby prompting the question why the CAA would require “counseling” for the victim of sexual harassment rather than for the harasser. “Counseling” in fact entails “providing the employee with all relevant information with respect to the[ir] rights” including information concerning the applicable provisions of the CAA. Therefore, the Board believes that consideration should be given to amending the CAA to refer to “claims counseling” or “statutory rights counseling.”

As with counseling, the Board supports the elimination of mediation as a mandatory jurisdictional prerequisite to asserting claims under the CAA. It nonetheless recommends that mediation be maintained as a valuable option available to those parties who mutually seek to settle their dispute. Again, the EEOC model provides useful guidance. After the EEOC notifies the employer of the filing of a formal charge, it offers eligible parties the option to participate in mediation. Both parties must agree to mediation, and unlike the CAA, the voluntary mediation process takes place *after* the administrative complaint, i.e., the charge, has been filed. A mediator does not impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. Resolving cases during mediation can save the parties from burdensome litigation, which can be expensive, time consuming, and a drain on resources and workplace productivity. Mediation also gives the parties an opportunity to explore resolving the dispute themselves without having a result imposed upon them. OOC mediators are highly skilled professionals who have the sensitivity, expertise and flexibility to customize the mediation process to meet the concerns of the parties. The OOC seeks to ensure that mediation proceedings are conducted in a manner that is respectful and sensitive to the concerns of the parties.

The effectiveness of mediation as a tool to resolve workplace disputes cannot be understated. Indeed, according to the EEOC, an independent survey showed that 96% of all respondents and 91% of all charging parties who used the EEOC mediation process would use it again if offered. Similarly, the OOC's experience over many years has been that a large percentage of controversies were successfully resolved without formal adversarial proceedings, due in large part to its mediation processes.

The Board is nonetheless aware of concerns that employees may find the mediation process intimidating—especially those who are legally unrepresented but who face an employing office represented by legal counsel. The Board also recognizes that mediation is most successful when both parties feel comfortable and adequately supported in the process. If the Committee determines that unrepresented employees would benefit from the presence of an advocate or ombudsman in a CAA mediation proceeding, the Board recommends that consideration be given to utilizing the OOC counselor or an employee from the OOC General Counsel's office to perform that role. In considering this option, the Committee should understand the protections already built into the OOC mediation process. Specifically, the CAA provides that mediation "shall involve meetings with the parties separately or jointly." As with counseling, an employee may participate in mediation over the telephone, or by similar means, and the employee may be represented by a representative in the employee's absence. Contrary to some media accounts, there is no requirement that the employee be in the same room as the accused during mediation.

Confidentiality Concerns

The Board is aware of suggestions that the confidential nature of the counseling and mediation process be reconsidered. As to the confidential nature of the counseling process, the Board believes that no changes are required. Although counseling between the employee and the OOC is strictly confidential, this means that the employing office is not notified by the OOC that the employee has filed a request for counseling, and counseling between the employee and the OOC is strictly confidential. Thus, the confidentiality obligation is on the OOC, not the employee. An employee remains free to waive the confidentiality requirement in counseling, to permit the OOC to contact the employing office in an attempt to resolve the dispute. The employee also remains free to speak publicly about the underlying employment concern, and about the fact that he or she has filed a claim with our Office. In short, the confidential nature of the counseling process is intended to provide employees with the ability to contact the CAA regarding their statutory rights knowing that the OOC will not disclose that contact to the employing office or anyone else.

The Board is also of the view that the limited confidentiality requirements associated with the mediation process serve important policy goals, are consistent with mediation models in the private and executive branch sectors, and should be maintained. At the outset of the mediation process, the parties sign an agreement to keep confidential all communications, statements, and documents that are prepared for the mediation. This confidentiality obligation concerns materials *prepared for the mediation process*. It does not prevent an employee from discussing underlying facts or allegations with others. The confidentiality obligation concerning materials prepared specifically for the mediation process encourages the parties to present their positions freely and candidly, which promotes and enhances the mediation process. The concept that information disclosed during mediation is confidential is an essential part of the process and is widely acknowledged. Indeed, under the EEOC model, all parties to voluntary mediation are also required to sign an agreement of confidentiality stating that information disclosed during mediation will not be revealed to anyone, including other EEOC investigative or legal staff.

Finally, with respect to the anti-discrimination and anti-harassment provisions of the CAA, the OOC was created to provide legislative branch employees with full, fair, and confidential proceedings to resolve their workplace disputes. These confidential proceedings are offered to employees as an alternative to the public legal proceedings of a United States courtroom. Many employees have chosen the private and confidential proceedings offered by the OOC precisely because the proceedings are private and confidential. Consequently, care must be taken before considering any proposal that would eliminate or weaken the confidentiality protections of the CAA, as such action may have the unintended effect of discouraging employees from reporting illegal conduct.

Settlement Agreements

The Board is aware of many articulated concerns regarding the confidential nature of certain settlement agreements regarding claims brought under the CAA. These are critical issues for the Committee to consider.

Under the CAA, it is for the parties to decide whether and how to settle a claim, and whether any settlement agreement should be confidential. Currently, the only statutory requirement for settlement agreements in the CAA is that they be in writing. The OOC does not have standardized language that parties are required to include in their settlement agreements. The OOC certainly does not require parties to include nondisclosure or confidentiality provisions in those agreements. The contents of settlement agreements—including any provisions governing disclosure—are solely determined by the parties and their representatives.

Some claimants may desire confidentiality because it protects them from unwanted publicity, whereas others may not because it could impede their ability to speak out against unlawful discrimination. Under no circumstances, however, should a confidentiality agreement be imposed on someone who does not want it. The Board stresses that, even if the parties agree to include a nondisclosure provision in their settlement agreement, that provision would be enforceable only to the extent that it is lawful and otherwise consistent with public policy. The Board is of the view, consistent with the EEOC, that a nondisclosure clause in a settlement agreement (as well as a non-disparagement agreement) cannot be interpreted or enforced to restrict an employee's ability to disclose information or communicate with relevant regulatory agencies, or to cooperate fully with such agencies in any investigation.

Finally, the CAA provides that settlement agreements shall not become effective unless they are approved by OOC Executive Director. Because the Act contains no substantive standards for approval, the OOC Executive Director's role in this process is largely ministerial. If Congress desires that the Executive Director conduct a more substantive review of settlement agreements as part of the approval process, the CAA would have to be amended to set forth substantive standards for review.

Amending the Complaint

We ask the Committee to consider reforming the CAA to allow for the amendment of employee complaints in a manner similar to that available to employees in the private sector and in the executive branch. If new events take place after an employee files an EEOC charge that the employee believes are discriminatory, the EEOC can add these new events to the initial charge by amending it. The EEOC then sends the amended charge to the employer and investigates the new events along with the rest.

The CAA does not currently provide for amending complaints in such a manner. If new events take place after an employee files a request for counseling with the OOC that she believes are unlawful—including alleged retaliation for filing the initial claim—she must file a new request for counseling, complete the mandatory counseling and mediation process again before filing a second formal complaint, and potentially consolidate the two complaints if the first complaint remains pending. The Board is of the view that the CAA should be amended to simplify this process by permitting the amendment of pending complaints to relate back to the initial filing in a manner similar to the process used by the EEOC.

Investigative and Prosecutorial Authority

Currently, the CAA only grants the OOC General Counsel the authority to investigate claims alleging violations of the Occupational Safety and Health Act of 1970, the Federal Service Labor Management Relations Statute, and the public access provisions of the Americans with Disabilities Act (“ADA”). The CAA does not authorize the OOC General Counsel to investigate claims concerning the laws applied by subchapter II, part A of the Act, including claims of employment discrimination under Title VII of the Civil Rights Act of 1964 or the ADA; the Rehabilitation Act of 1973; the Family and Medical Leave Act (“FMLA”); the Fair Labor Standards Act; the Age Discrimination in Employment Act; the Worker Adjustment and Retraining Notification Act; the Employee Polygraph Protection Act; and veterans’ employment and reemployment rights under chapter 43 of title 38 of the U.S. Code.

Unlike the OOC, when a private sector or executive branch charge is filed, the EEOC/OSC has statutory authority to investigate whether there is reasonable cause to believe discrimination occurred. As part of its investigation, the EEOC asks the employer to provide a written answer to the charge, called a Position Statement. It may also ask the employer to answer questions about the claims in the charge, interview witnesses and ask for documents. If an employer refuses to cooperate with an EEOC investigation, the EEOC can issue an administrative subpoena to obtain documents or testimony or to gain access to facilities.

The Board supports suggestions to grant the OOC General Counsel similar investigative authority. One suggested approach would be to grant the General Counsel investigatory authority mirroring that of the equivalent executive branch agencies – i.e., the EEOC for discrimination complaints and the OSC for whistleblower reprisal complaints. As discussed above, the mechanism for doing this already exists in the CAA: the General Counsel is granted selected parts of the authority of the Federal Labor Relations Authority for labor-management issues (CAA section 220(c)(2)) and of the Secretary of Labor for OSH issues (CAA section 215(c)(1), (c)(2), and (e)(1)). Amending the CAA in this manner with regard to workplace claims of discrimination, harassment and retaliation under the laws applied by subchapter II, part A of the CAA

would best achieve the Act's policy goal of making the legislative branch subject to the equivalent workplace laws and enforcement mechanisms as the executive branch and the private sector. Further, the Office would benefit from the body of law and expertise already developed by the EEOC and OSC in conducting its investigations.

Any legislation granting the OOC General Counsel investigatory authority should also specify that the Office has the ability to file a complaint if the General Counsel determines that violations have occurred, just as the CAA does with the Occupational Safety and Health Act and Federal Service Labor Management Relations Statute. Such legislation should also include administrative subpoena authority for dealing with employing offices or other parties who refuse to cooperate with the General Counsel's investigations. Empowering the OOC General Counsel to prosecute complaints of discrimination and harassment would address many recently expressed concerns regarding both the intimidation and the litigation challenges faced by employees seeking relief under the current statutory framework —especially those without the resources to retain legal counsel.

Several other important issues must be addressed. First, would the General Counsel's investigation be mandatory or optional on the part of the complaining party? Again, executive branch models should be considered. If, at the close of an EEOC investigation, it is not able to determine that the law was violated, the EEOC provides the complainant with a Notice of Right to Sue, which gives the complainant permission to file a lawsuit in court. However, complainants may also request a Notice of Right to Sue from the EEOC if they wish to file a lawsuit in court before the investigation is completed, which effectively makes the EEOC investigation optional. Other models in the federal government require administrative exhaustion. The OSC process for investigating claims of whistleblower reprisal, for example, requires a complainant to allow the agency a specified period of time to investigate a complaint and to issue a "closure letter" before the complainant has the right to independently litigate the case.

Second, if the employee elects an investigation and the investigation determines the law may have been violated, should the OOC General Counsel try to reach a voluntary settlement with the employing office, as the EEOC would with an employer in the private sector, or as the OSC would with a federal agency in investigating a whistleblower reprisal claim? Allowing the General Counsel to play this representative role on behalf of a covered employee may meet some of the concerns explored above regarding employee discomfort in the mediation process.

If a settlement is not reached, should the OOC General Counsel have the discretion to determine whether or not to file a formal complaint on the employee's behalf, similar to the discretion granted to the EEOC? Many, but not all of these details can be addressed in the regulatory process, which can take into consideration differences from the equivalent executive branch regulations as needed.

Investigating and Prosecuting Claims of Retaliation under the CAA

The Board has also recommended to Congress in its biennial section 102(b) reports that the Office of General Counsel be granted enforcement authority with respect to section 207, the anti-retaliation provision of the CAA, because of the strong institutional interests in protecting employees against intimidation or reprisal for the exercise of their statutory rights or for participation in the CAA's processes. Investigation and prosecution by the Office of General Counsel would more effectively vindicate those rights, dispel the chilling effect that intimidation and reprisal create, and protect the integrity of the Act and its processes. Enforcement authority with respect to intimidation or reprisal is provided to the agencies that administer and enforce the CAA laws in the private sector. In contrast, under the CAA, the rights and protections provided by section 207 are vindicated only if the employee, after counseling and mediation, pursues his or her claim before a hearing officer or in district court.

Experience in the administration and enforcement of the CAA argues that the Office should be granted comparable authority to that exercised by the executive branch agencies that implement the CAA laws in the private sector. Covered employees who have sought information from the Office respecting their substantive rights under the Act and the processes available for vindicating these rights have expressed concern about their exposure in coming forward to bring a claim, as well as a reluctance and an inability to shoulder the entire litigation burden without the support of agency investigation or prosecution. Moreover, employees who have already brought their original dispute to the counseling and mediation processes of the Office and then perceive a reprisal for that action may be more reluctant to use once again the very processes that led to the claimed reprisal.

Whatever the reasons a particular employee does not bring a claim of intimidation or reprisal, such unresolved claims threaten to undermine the efficacy of the CAA. Particularly detrimental is the chilling effect on other employees who may wish to bring a claim or who are potential witnesses in other actions under the CAA. Without effective enforcement against intimidation and reprisal, the promise of the CAA that congressional employees will have the same civil rights and social legislation that ensure fair treatment of workers in the private sector and the executive branch is rendered illusory. Therefore, in order to preserve confidence in the Act and to avoid discouraging legislative branch employees from exercising their rights or supporting others who do, the Board recommends that Congress grant the Office the authority to investigate and prosecute allegations of intimidation or reprisal as they would be investigated and prosecuted in the private sector and the executive branch by the implementing agency.

Under any circumstances, Congress would have to devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Thus, the OOC would

need significant additional resources, including several more FTEs, if investigatory authority were granted.

Eliminating the “Cooling Off” Period

As discussed above, the CAA requires that employees not pursue a formal administrative complaint with the OOC or a lawsuit in a U.S. District Court until not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. This statutory timing requirement creates a 30-day period—sometimes referred to as a “cooling off period”—before the employee can proceed. The Board recommends that the CAA be amended to eliminate this period and instead provide that the employee may proceed with an administrative or judicial complaint any time within 90 days of the issuance of the equivalent of a “right to sue” notice, as discussed above. That notice would be issued to the employee at the conclusion of voluntary counseling, voluntary mediation, the investigation, or at the request of the employee, as the case may be.

Other Recommendations for Improvements to the CAA

Library of Congress

Currently, only certain provisions of the CAA apply to employees of the Library of Congress (“LOC”). The Board supports the proposal contained in the current Senate legislative branch appropriations bill that would amend the CAA to include the LOC within the definition of “employing office,” thereby extending CAA protections to LOC employees for most purposes.

Adopt Recordkeeping Requirements under Federal Workplace Rights Laws

The Board, in several section 102(b) reports, has recommended and the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII. Although some employing offices in the legislative branch keep personnel records, there are no legal requirements under the CAA to do so.

Most federal workplace rights statutes that apply to private and public sector employers require the employer to retain personnel records in a certain manner and for a certain period of time. Title VII requires an employer to maintain certain personnel records, although no particular form of retention is specified. All personnel and employment records made or kept by an employer, including applications and records pertaining to hiring, promotion, demotion, transfer, layoff or termination, pay rates and other compensation terms, and training must be retained for 1 year from the date of making the record or the personnel action involved, whichever is later. Title VII further

requires that once a discrimination claim is filed, all personnel records relevant to the claim must be retained until final disposition of the charge or action.

Personnel records may be essential for congressional employees to effectively assert their rights under the CAA. Such records may also be critical evidence for employers to demonstrate that no violations of workplace rights laws occurred. Accordingly, the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII.

Approve the Board's Pending Regulations

In an effort to bring accountability to itself and its agencies, Congress passed the CAA, establishing the OOC to, among other roles, promulgate regulations implementing the CAA to keep Congress current and accountable to the workplace laws that apply to private and public employers. The Board is required to amend its regulations to achieve parity, unless there is good cause shown to deviate from the private sector or executive branch regulations. The Board recommended in its 2016 section 102(b) Report to the 115th Congress that it approve its pending regulations that would implement the FMLA, ADA Titles II and III, and USERRA in the legislative branch.

Apply the Wounded Warrior Federal Leave Act of 2015 to the Legislative Branch

In 2015, the 114th Congress unanimously voted to enact the Wounded Warrior Federal Leave Act. The law affords wounded warriors the flexibility to receive medical care as they transition to serving the nation in a new capacity. Specifically, new federal employees, who are also disabled veterans with a 30% or more disability, may receive 104 hours of “wounded warrior leave” during their first year in the federal workforce so that they may seek medical treatment for their service-connected disabilities without being forced to take unpaid leave or forego their medical appointments. The Act amends title 5 of the United States Code and was reportedly passed as a way to show gratitude and deep appreciation for the hardship and sacrifices of veterans and, in particular wounded warriors, in service to the United States. In its 2016 section 102(b) Report, the Board recommended the Congress extend the benefits of that Act to the legislative branch with enforcement and implementation under the provisions of the CAA.

Protect Employees Who Serve on Jury Duty (28 U.S.C. § 1875)

Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover legislative branch employment. For the reasons set forth in the 1996, 1998, 2000 and 2006 section 102(b) reports, the

Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

*Protect Employees and Applicants Who Are Or Have Been In Bankruptcy
(11 U.S.C. § 525)*

Section 525(a) provides that “a governmental unit” may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person because that person is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the legislative branch. For the reasons stated in the 1996, 1998, 2000 and 2006 section 102(b) reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

*Prohibit Discharge of Employees Who are or have been Subject to Garnishment
(15 U.S.C. § 1674(A))*

Section 1674(a) prohibits discharge of any employee because his or her earnings “have been subject to garnishment for any one indebtedness.” This section is limited to private employers, so it currently has no application to the legislative branch. For the reasons set forth in the 1996, 1998, 2000 and 2006 section 102(b) reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Thank you for soliciting our views on these most important matters. The OOC stands ready to work with this Committee to ensure a workplace for legislative branch employees that is free from unlawful harassment, discrimination, and retaliation.

The CHAIRMAN. Thank you, Ms. Grundmann, for your testimony. We look forward to asking you some questions soon.

And we will now recognize Ms. Lett, Counsel for the Office of House Employment Counsel.

Welcome, Ms. Lett.

STATEMENT OF GLORIA LETT

Ms. LETT. Good morning. I want to thank the Committee on House Administration for inviting me for a second time to give testimony on the issue of preventing sexual harassment in the workplace. This testimony will supplement the written testimony that I submitted to the Committee earlier this week.

I want to start by referring to an opinion piece I read on the cover of The Washington Post yesterday. It was entitled, "I Was Sexually Harassed. Question My Story." It was written by a woman named Karissa Fenwick.

In the article, Ms. Fenwick tells her story of how she was sexually harassed. She goes on to say, "Question my story because we need to examine our views about sexual harassment and misconduct." And, she said, "By their nature, harassment complaints are characterized by gray areas and few witnesses. Victims and perpetrators are both flawed and sympathetic."

I thought it was important to read Ms. Fenwick's language because it captures, better than I probably could ever do, the challenges my office faces in our role as counsel for the employing offices on these issues. I read her words to mean that there has to be discussion and understanding around these issues. And when I say "these issues," I mean allegations of discrimination.

Sexual harassment is a form of unlawful discrimination, just like discrimination based on race, color, religion, national origin, age, and disability.

I also read her words to mean that automatically characterizing any questions about the basis for sexual harassment allegations as victim blaming is counterproductive to rooting out sexual harassment, and I agree. Part of the role of my office is to question employees' claims of discrimination, including sexual harassment, and to do so is not victim blaming.

On a personal note, like most women in this country, I have experienced sexual harassment in the workplace. It occurred during the early part of my employment, and my way of dealing with it was to leave a job that I liked.

As a woman of color, I have also experienced race discrimination in the workplace. I worked for a private company where a White manager brought in a whip, which he prominently displayed in his office. And when questioned about it, he said he wanted to, quote, unquote, motivate the black employees.

I believe these and other experiences have made me more sensitive to allegations of discrimination, not less. And I am probably a better lawyer for it because I understand the perspective of both the employee and the employer. I also try to lead by example as the head of my office.

Posing difficult and challenging questions to employees, most often through their lawyers, is necessary to assess whether sexual

harassment has occurred and correcting any inappropriate behavior.

On the other side of that equation, when we are contacted about these issues, which unfortunately does not happen in all instances, and our clients tell us that they have done absolutely nothing wrong, we question that, too. We are not in the business of covering up unlawful behavior, but rather, we examine those gray areas that I mentioned earlier by conducting thorough investigations and then working with our clients to figure out how to address the concern both legally and practically.

The congressional workplace is a microcosm and in many ways reflects workplaces across the America. Yes, sexual harassment occurs in the Congress, just like it does in other workplaces, and while the more serious allegations of sexual harassment, and borderline criminal behavior in some instances, tends to receive the most attention from the media, those types of allegations are not the norm on Capitol Hill, at least not in my office's collective experience. And, of course, I recognize that this kind of behavior does go unreported, so that may account for some of that.

I want to try to answer the question of what has worked to address the concern about sexual harassment. I wish there was an easy answer, but there is not. Although it is not a panacea, I believe mandatory in-person training is very helpful. I have trained quite a few Members on this issue lately, and the response has been encouraging. I am hopeful that the training has meant that Members are talking directly with their employees and telling them that they should come forward with concerns without fear of retaliation.

Employees won't always believe it, but this is still a positive step and it might help to change a perception held by some that these issues should not be reported.

I will say that training does work effectively, but it doesn't work effectively when Members schedule it around or near votes.

While I am convinced that no amount of training will fix truly egregious conduct, that will require other mechanisms of accountability, again, it is a step in the right direction.

In closing, I want to thank the Committee again, and I welcome your questions.

[The statement of Ms. Lett follows:]

Written Testimony Of
Gloria J. Lett (Counsel, Office of House Employment Counsel)
Before the
Committee on House Administration

December 7, 2017

Written Testimony of Gloria J. Lett (Counsel, Office of House Employment Counsel) before the Committee on House Administration

Good morning Chairman Harper, Vice Chairman Davis, Ranking Member Brady, and Members of the Committee on House Administration.

My name is Gloria Lett and I am the Counsel for the Office of House Employment Counsel ("OHEC").

Thank you for inviting me to speak again and to provide input on the topic of examining reforms to the Congressional Accountability Act of 1995 ("CAA").

In offering these remarks, I wish to emphasize that my office is non-partisan in nature and has a separate attorney-client relationship with each House employing office. Accordingly, my office can offer its assessment of employment law issues and some of my comments may have to be more in the context of hypothetical scenarios.

1. Administrative and Judicial Dispute-Resolution Procedures under the CAA

As the Committee knows, the CAA establishes procedures by which individuals who believe they have been subjected to sexual harassment or other CAA violations may bring claims against the employing office alleged to have committed the violation. *See generally* 2 U.S.C. §§ 1401-1416. Because a number of questions have been raised about these procedures, I would like to begin by addressing this issue in depth.

The first step in the CAA process is for the individual – who may be an applicant or a current or former employee – to request counseling from the Office of Compliance. *Id.* § 1402. The individual can do this immediately after the alleged violation occurs, or the individual can wait for up to 180 days. ***The formal counseling period lasts for 30 days, but this timeframe may be reduced at the request of the individual.*** At this point, the office is not made aware of any inquiry or potential complaint.

After the counseling period has concluded, the individual may file a written request for mediation with the Office of Compliance. *Id.* § 1403. The mediation period lasts for 30 days unless both parties voluntarily agree to extend the period (e.g., because of scheduling conflicts).

In the experience of my office, the vast majority of CAA cases are successfully resolved by the end of the mediation stage and do not proceed to litigation. This reflects the consensus view of attorneys, managers, and alleged victims that settlement is almost always to everyone's benefit – including those employees who feel they are experiencing harassment and may be seeking a speedy resolution of the problem. The simple fact is that mediation is able to resolve employment disputes much faster than litigation. Indeed, recent federal court statistics reveal that civil cases that proceed to trial take a median of 26.3 months – or more than two years – to resolve. United States District Courts – National Judicial Caseload Profile, Federal Court Management Statistics,

http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2017.pdf.¹ This period is substantially longer in the District of Columbia federal court, where most CAA cases are filed, and the median time for resolution of a complaint from filing to trial was 50.2 months as reflected in recently reported statistics. This more than four-year timeframe can be significantly lengthened if a case is appealed.

In contrast, under the CAA, the counseling and mediation process is typically completed within 60 days (unless the parties mutually agree to extend mediation), and cases handled by OHEC are usually resolved within this timeframe. This appears to be the experience of the Legislative Branch as a whole. The Office of Compliance states that a total of 65 cases went through the mediation process in Fiscal Year 2016 (including 42 new claims filed that year), and that 36 claims were resolved in mediation. FY 2016 Annual Report - State of the Congressional Workforce: A Report on Workplace Rights, Safety & Health, and Accessibility Under the Congressional Accountability Act, Office of Compliance, <https://www.compliance.gov/publications/reports-issued-office-compliance/annual-reports>.

In some instances, parties are unable to resolve a dispute at mediation. An employee may then choose to file a complaint with either the Office of Compliance or a federal court within 30 to 90 days of the conclusion of the mediation period. 2 U.S.C. § 1404. ***This means that an individual has the right to initiate litigation under the CAA as soon as 90 days after an alleged violation has occurred — a remarkably swift timeframe compared to what employees in the private sector or the Executive Branch typically face.***

For example, a private sector employee who brings a sexual harassment lawsuit under federal law generally must first obtain what is called a “Notice of Right to Sue” letter from the Equal Employment Opportunity Commission (“EEOC”). *See generally* What You Can Expect After You File a Charge, EEOC, <https://www.eeoc.gov/employees/process.cfm>.² Before an employee can obtain this right to sue letter, however, the employee is required to file a “charge” with the EEOC, which is supposed to investigate. EEOC may also attempt to resolve the charge through conciliation or litigation. The EEOC states that the average investigation in 2015 took ten months to complete. *Id.* Because this process can be so lengthy, many employees opt to forgo the EEOC process, and will instead file suit on their own in federal court. According to the EEOC, “[g]enerally, [the charging party] must allow EEOC 180 days to resolve [the] charge” before it will issue the mandatory right to sue letter. After You Have Filed a Charge, EEOC, <https://www.eeoc.gov/employees/afterfiling.cfm>. ***Thus, private sector employees generally must wait at least six months before they can file a harassment suit under federal law, and it may then take years for the case to actually be adjudicated to final judgment.***

The administrative process for federal civil service employees of the Executive Branch is much more complex than for Legislative Branch employees. *See generally* Overview of Federal

¹ Civil actions in U.S. district courts took a median of 9.9 months to resolve when they were disposed of prior to trial (e.g., summary judgment or settlement).

² Depending on the jurisdiction, litigants may also be able to pursue administrative or judicial remedies under state or local law.

Sector EEO Complaint Process, U.S. Equal Employment Opportunity Commission EEOC), https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.³ Like private sector employees, however, most federal civil service employees must wait 180 days (six months) before obtaining the right to file suit in federal court. Specifically, as under the CAA process, these employees generally must complete a mandatory 30-day counseling period. In most cases, the EEO Counselor at the agency where the employee works will give the employee an opportunity to participate in mediation or another alternative dispute resolution (ADR) program.

If the dispute is not settled through ADR, the employee may file a formal complaint with the agency's EEO Office. The agency then may dismiss the complaint on procedural grounds or conduct an investigation. The investigation process can take up to 180 days – or six months – to complete. When an investigation concludes, the employee may request a hearing before an EEOC Administrative Judge (AJ). When the hearing concludes, the AJ issues a decision – but this still is not the end of the process. According to the EEOC:

When an AJ has issued a decision (either a dismissal, a summary judgment decision or a decision following a hearing), the agency must take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision. The final order must notify the complainant whether or not the agency will fully implement the decision of the AJ, and shall contain notice of the complainant's right to appeal to EEOC or to file a civil action. If the final order does not fully implement the decision of the AJ, the agency must simultaneously file an appeal with EEOC and attach a copy of the appeal to the final order. 29 C.F.R. Section 1614.110(a).

Federal EEO Complaint Processing Procedures, EEOC, <https://www.eeoc.gov/eeoc/publications/fedprocess.cfm>. *Alternatively, the employee may quit the EEOC process in some cases and file suit in federal court after 180 days (6 months) have passed from the date the original complaint was filed.*

As this brief summary highlights, the EEO process under the CAA is remarkably fast compared to the procedures available under other federal laws.⁴ The CAA also gives employees the option of filing a complaint with the Office of Compliance rather than pursuing litigation in federal court – an alternative that private sector employees do not enjoy. In our experience, many Legislative Branch employees choose this option because the process is so much faster than federal court litigation. *The option to go this route is solely at the employee's choosing.* By statute, the administrative hearing must begin within 60 to 90 days of the date that the complaint is filed. 2 U.S.C. § 1405(d)(2). Therefore, considering the entire process from counseling to mediation to the administrative hearing stage, *a Legislative Branch employee may*

³ The process may be different if the individual is a member of the military, the dispute is subject to a collective bargaining agreement, etc.

⁴ The process will typically be much slower if the employee chooses to file suit in federal court, where the timing will be controlled by court rules and subject to the demands of each court's particular docket. *Supra* note 1 and accompanying text. The timing and procedures available under state and local laws vary from jurisdiction to jurisdiction.

realistically adjudicate a claim and obtain relief within approximately 180 days of the alleged CAA violation – a much shorter timeframe than other employees typically experience.

2. Settlement of CAA Claims Brought Against House Employing Offices

A second issue that has been the subject of recent public discussion concerns the payment of monetary settlements for alleged violations from the CAA's judgment fund. *Id.* § 1415(a). Therefore, I will spend some time explaining how this process works for House employing offices.

First, the parties involved in the dispute – that is, the employee and the employing office – must reach a mutually agreeable settlement agreement. This often occurs during the mediation period. *Id.* § 1403(c). With rare exceptions, employees are represented by their own counsel during mediation.

Second, my office, OHEC, submits a justification memorandum to this Committee. The justification memorandum discusses the results of an investigation of the underlying facts, the relevant law, the legal risk associated with litigating the case, and the potential monetary exposure. Based on this information, the Committee decides whether monetary settlement is appropriate under the circumstances. OHEC's justification memorandum does not disclose the identity of the parties involved in the dispute because of the statutory requirement that CAA matters at this stage "shall be strictly confidential." *Id.* § 1416. In addition, OHEC's practice of submitting generic memoranda to the Committee helps to ensure that personal, political, and other non-CAA factors do not enter into the approval process.

Third, the Chair and Ranking Minority Member of the Committee must jointly approve the amount of the settlement. *See* House Rule X, cl. 4(d)(2). House Rules do not specify a timeframe for the Committee's approval process to be completed, and no formal guidance has been issued to explain the criteria used by the Committee to evaluate settlement requests.

Finally, the Executive Director of the Office of Compliance must approve the parties' written settlement agreement. 2 U.S.C. § 1414. Once this occurs, the Office of Compliance administratively processes payments as required from the CAA judgment fund.

Beyond this publicly available information, I am limited in what I can say about the settlement process by the attorney-client privilege, as well as by the confidentiality provisions of the CAA and of most negotiated settlement agreements. ***However, I can say that the mere fact that an employing office may agree to settle a case does not mean that the office admits liability or other wrongdoing.*** On the contrary, most employing offices expressly deny liability, and they insist that language to this effect be included as a term of the parties' settlement agreement.

In addition, when a House employing office consults my office for advice regarding alleged CAA violations such as sexual harassment, the office is advised to internally investigate the matter, with OHEC's assistance, and to take action as needed to correct any problems. Depending on the circumstances, an office's investigation may involve interviewing the

applicant or employee who believes that a violation has occurred, the individual(s) alleged to be responsible for the violation, and any witnesses with knowledge of the matter. Offices may also review emails or other documents that shed light on the issue. *In other words, this investigative process is not perfunctory in nature and, in my experience, is taken extremely seriously by House employers (as it is by the attorneys of my office).*

When an alleged violation involves actual or threatened litigation, OHEC makes an assessment of the legal risks and of the time, resources, and taxpayer dollars that will be spent defending the claim. We share our assessment with the employing office so that it can better determine whether settlement may be justified for legal or financial reasons – just as private sector employers routinely do every day.

The decision to settle belongs solely with the employing office based on privileged attorney-client discussions with OHEC. Although I cannot speak about specific settlement agreements, I can state that a variety of factors typically go into the decision-making process. These factors may include the following:

- The law may be unclear as to whether an office has or has not violated its legal obligations. For example, courts may have issued conflicting decisions regarding legal issues that have not been definitively settled by the Supreme Court. Some laws may also depend on a “reasonable person” standard that is impossible to quantify in precise scientific or mathematical terms.
- Often the facts are not clear even after an exhaustive investigation has occurred. Witnesses may offer wildly different factual accounts, and usually there is no “smoking gun” evidence of wrongdoing. Ultimately, in the American legal system, these kinds of factual disputes must be decided by jurors. This means that an office typically cannot know with certainty how a case that is litigated will be resolved – even when the office reasonably believes that it did not violate the law.
- In rare cases an office determines that misconduct has occurred, but its ability to take corrective action may be limited (e.g., if an aggrieved employee no longer works for the office).
- Many claims have little apparent legal or factual merit, but an office may still determine that defending the claim will result in the inefficient use of government resources. For example, litigation may require lengthy interviews of Members, employees, and other witnesses; depositions that may last a full day for each witness; and, if a case proceeds to trial, the testimony of those same witnesses. Offices must also devote significant staff time to responding to discovery requests, collecting relevant documents (which may require reviewing thousands and thousands of emails and other documents), and addressing other litigation matters.
- Litigation has a number of direct costs, including travel to district offices, deposition fees, expert witness fees, and the expense of conducting electronic

discovery in compliance with court rules. In my office's experience, direct litigation costs can range anywhere from several thousand dollars to well in excess of \$50,000 per case – regardless of whether the case has any legal or factual merit. Offices must therefore weigh the often low cost of settling (e.g. \$500) versus the known and unknown costs and risks of litigation.

- Litigation in the American legal system is an adversarial process that typically lasts for years and takes a toll on all parties involved – including the plaintiffs.
- Finally, as the Office of Compliance has observed, “The advantage of a mediated settlement is that it allows both parties in a dispute to take an active role in reaching a settlement rather than having a judgment imposed upon them by a hearing officer or judge.” Dispute Resolution Process – Filing a Claim, Office of Compliance, <https://www.compliance.gov/services/dispute-resolution-process>.

For all of these reasons, House employing offices may conclude that settlement is justified even when the office's investigation has concluded that a claim is without merit. In short – and as the media has reported in the context of discussing private sector employment litigation – “It is often in the company's best interest to provide a settlement to the accuser, regardless of whether the case is valid or not.” Why employers settle sexual harassment claims, CBS News (November 3, 2011), <https://www.cbsnews.com/news/why-employers-settle-sexual-harassment-claims/>.

3. Confidentiality of CAA Settlements

When lawsuits are settled in the American system, the parties often voluntarily agree to include non-disclosure and non-disparagement provisions in their written settlement agreements. These provisions are intended to protect the confidentiality of settlement terms and other details regarding the parties' dispute. Employers often insist on such protections because of a feared perception that settlement implies guilt. Members of Congress, in particular, sometimes fear that publicity will harm their reputations regardless of the claim's merits. Members and other employers may also fear that publication of settlements will engender copycat lawsuits that lack merit. Plaintiffs often demand confidentiality for other reasons. For example, they may fear that a prospective employer will be unlikely to hire them if it hears they have been involved in litigation against a former employer. A plaintiff may also find certain allegations embarrassing to discuss in public (as the litigation process requires).

For these and many other reasons, confidentiality is often a win-win proposition and essential to the settlement process. ***However, no alleged victim is ever forced to settle a CAA claim on confidential terms.*** Rather, this is an issue that every aggrieved employee may freely negotiate (or direct his or her counsel to negotiate). The CAA also gives all covered employees the right to file a public complaint in federal court once the Office of Compliance's administrative process has concluded. The suggestion that individuals are being prevented from publicly discussing allegations against their will is therefore false. As one attorney who has represented CAA plaintiffs explains, “The victims often desire that confidentiality because it protects them from the media frenzy that follows when members of Congress are the subject of

discrimination and harassment lawsuits. Confidentiality also helps those victims get their next jobs. . . .” Les Alderman, Why the ‘fix’ to Congress’s sexual harassment policies could backfire, Politico (November 30, 2017), <https://www.politico.com/agenda/story/2017/11/30/fix-to-congress-sexual-harassment-policies-could-backfire-000586>.

Finally, House employees who are experiencing workplace issues have the ability to contact the Office of Congressional Ethics, the U.S. Capitol Police, the House’s Office of Employee Assistance, and other resources if they feel that the CAA process cannot adequately remedy a problem.

4. Statistics Regarding Settlement of CAA Claims

On November 16, 2017, the Office of Compliance released a letter that details “award and settlement figures” paid from the CAA’s judgment fund from Fiscal Year 1997 through Fiscal Year 2017. Office of Compliance, <https://www.compliance.gov/sites/default/files/2017.11.16%20Awards%20And%20Settlements%20Appropriation.pdf>. These figures indicate that the Legislative Branch has paid or settled a total of 264 claims over a 20-year period totaling \$17,241,118. This equates to an average settlement or award of approximately \$65,307 per case.

It is important to note that these figures do *not* cover sexual harassment claims specifically or Members of Congress specifically. As the Office of Compliance carefully explained, “[a] large portion of cases originate from employing offices in the legislative branch other than the House of Representatives or the Senate, and involve various statutory provisions incorporated by the CAA, such as the overtime provisions of the Fair Labor Standards Act, the Family and Medical Leave Act, and the Americans with Disabilities Act.” *Id.*

On December 1, 2017, this Committee publicly released information obtained from the Office of Compliance on settlements involving “House Member led Offices” paid from the CAA’s judgment fund. Updated Data on Harassment in the Congressional Workplace, Committee on House Administration, <https://cha.house.gov/press-release/updated-data-harassment-congressional-workplace>. *This information reveals that, from Fiscal Year 2013 to the present, there have been six paid settlements involving offices led by one of the 435 Members of the House.* Two of those claims involved allegations of sex discrimination, and one of these two sex discrimination claims involved specific allegations of sexual harassment. According to the Office of Compliance, “[t]he 1 claim that alleged sexual harassment was for \$84,000,” and “[t]he 1 claim that alleged discrimination because of sex and religion as well as FLSA violations and retaliation was for \$7,000.” The average settlement amount for all cases involving House Member led offices during this time period was approximately \$59,908.

To help put these numbers into context, the Committee may find it helpful to consider the following statistics regarding the EEO process outside of the Legislative Branch:

- The EEOC resolved 97,443 charges in Fiscal Year 2016 through its conciliation and mediation programs or other means.⁵ The agency reports that its “mediation program achieved a success rate of over 76 percent – saving resources for employers, workers, and the agency. Participants rate the mediation program highly, with 97 percent reporting that they would mediate future charges with the agency.” *Id.*
- Legal scholars estimate that 70 percent of all employment disputes that end up in court settle prior to trial.⁶ This figure reflects the consensus of employers, employees, and their attorneys that it is generally in everyone’s best interest to resolve cases and avoid litigation (which, as noted, is a process that typically takes years to complete and can be costly).
- A detailed analysis of settlement outcomes in one federal district court found that the average employment lawsuit that settles does so for \$55,000 (approximately \$69,000 in today’s dollars).⁷
- Another well-documented study found that the average jury verdict in federal court employment cases exceeds \$490,000 (approximately \$572,000 in today’s dollars).⁸

⁵ What You Should Know: EEOC’s Fiscal Year 2016 Highlights, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/2016_highlights.cfm.

⁶ Mina J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 Washington & Lee Law Review 111 (2007) (analyzing data provided by the U.S. District Court for the Northern District of Illinois), <http://law2.wlu.edu/deptimages/Law%20Review/64-1%20Kotkin%20Article.pdf>.

⁷ *Id.* Most settlements are confidential, making accurate statistics difficult to obtain. The cited study was able to overcome this obstacle by analyzing an anonymously coded dataset of 1,170 cases that were settled by magistrate judges in one federal district court over a six-year period ending in 2005. The adjusted figure provided by OHEC is based on the Bureau of Labor Statistics’ Consumer Price Index Calculator available at http://www.bls.gov/data/inflation_calculator.htm.

⁸ Elizabeth Erickson and Ira B. Mirsky, *Employers’ Responsibilities When Making Settlements in Employment-Related Claims*, Bloomberg Law Report (2009). Notably, the figure cited here only accounts for compensatory damages. Depending on the case, a plaintiff may also be awarded liquidated damages, attorneys’ fees, and other forms of monetary and equitable relief (such as reinstatement, a promotion, or a pay raise). The adjusted figure provided by OHEC is based on the Bureau of Labor Statistics’ Consumer Price Index Calculator available at http://www.bls.gov/data/inflation_calculator.htm.

5. **Questions about the CAA Dispute-Resolution Process**

My office stands ready to answer questions about the current CAA dispute-resolution process. We are also available to offer a legal assessment of how proposed amendments to the process may impact the legal interests of House employing offices, including the following:

- Eliminating or making other changes to the CAA’s successful mediation process.
- Eliminating the current 30-day “cooling off” period following mediation (a time when, in our experience, passions often cool and disputes are successfully resolved).
- Eliminating the ability of the parties to voluntarily settle on confidential terms (including an assessment of how such a change would dramatically deviate from American legal norms and potentially harm both Members and taxpayers, as well as alleged victims, by discouraging settlement).
- Restricting the ability to settle cases using public funds (e.g., by keeping employees on an office’s payroll for a period of time so that they can continue to receive health insurance benefits and represent to prospective employers they are not unemployed, which may carry a perceived stigma).
- Addressing the problem of alleged “serial” harassers and other violators in a way that respects due process rights, the privacy rights of alleged victims, and the confidentiality of any settlement agreements that interested parties may have negotiated.

Finally, if requested, we can share our legal assessment regarding claims of victims’ advocates that certain proposed amendments may have the unintended consequence of actually harming victims. *See, e.g.,* Les Alderman, Why the ‘fix’ to Congress’s sexual harassment policies could backfire, Politico (November 30, 2017), <https://www.politico.com/agenda/story/2017/11/30/fix-to-congress-sexual-harassment-policies-could-backfire-000586>.⁹

⁹ Mr. Alderman – an attorney with experience representing CAA plaintiffs – opposes proposals “to publicize the names of lawmakers who reach any such settlements and to prohibit settlements from using taxpayer money. The change is pitched as a reform to bring transparency and accountability to a secretive process that lets perpetrators get away with bad behavior. But as a civil rights lawyer whose firm has represented numerous victims of discrimination and harassment, including victims employed by members of Congress, I can assure you that this proposal is dangerous. Whether intentional or not, the bill punishes victims of harassment who would come forward in the future and who have come forward in the past and would make it less likely that victims would come forward to make claims in the future.”

The CHAIRMAN. Thank you, Ms. Lett.

The Chair will now recognize Daniel Crowley for 5 minutes for the purposes of an opening.

Thank you.

STATEMENT OF DANIEL F.C. CROWLEY

Mr. CROWLEY. Thank you. Chairman Harper, Ranking Member Brady, and Members of the Committee, thank you for the opportunity to testify today.

My name is Dan Crowley. I am a partner at the law firm of K&L Gates. I note at the outset that my comments are my own and do not represent the views of the firm, my colleagues, or any firm clients.

I had the privilege of serving as counsel to the Committee under Congressman Bill Thomas from March 1991 through early 1998, a period that straddled the Republican revolution of 1994. The Congressional Accountability Act was the first law enacted by the new Republican Congress in 1995.

However, it is important to note that these are not fundamentally partisan issues. Rather, they are institutional in nature. In fact, the Committee's consideration of this legislation began under the previous Democratic majority.

The basic principles that in the past guided the Committee in this area are, one, if a law is right for the private sector, it is right for Congress; two, Congress will write better laws when it has to live by the same laws it imposes on the private sector and executive branch; and three, the separation of powers embodied in the Constitution must be respected.

The challenge faced by the Committee more than two decades ago was to reconcile these principles. At that time it was felt that the procedures established to provide a means for redress of grievances by employees must take into consideration that in the congressional context allegations can be career-ended, even if they subsequently prove to be untrue.

The key constitutional provision at issue is the Speech or Debate Clause, which has repeatedly been interpreted by the U.S. Supreme Court as providing immunity for Members of Congress for not only speech or debate in either House, but also for other matters that the Constitution places within the jurisdiction of either House. Moreover, lower courts have ruled that Speech or Debate Clause immunity attaches to employment decisions by Members in certain circumstances.

Against this constitutional backdrop, the Committee sought to establish a procedure to address violations of the Federal labor and employment laws by Members of Congress. Toward that end, the CAA provided for the creation of the Office of Compliance within the legislative branch and charged it with responsibility for promulgating implementing regulations, conducting studies, and, importantly, carrying out a program for educating employing authorities.

Perhaps the most significant provisions in the CAA provide for a right of limited judicial review. However, the CAA was carefully crafted to avoid waiver of Speech or Debate Clause immunity. For example, Section 502 provides: "It shall not be a violation of any

employment discrimination provision to consider the party affiliation, domicile, or political compatibility with the employing office.” In other words, such factors provide an affirmative defense to allegations of discrimination.

As described in the Committee report: “This provision and the exemptions listed therein recognize the special nature of employment in Congress by allowing Member offices, as well as Committee and leadership offices, to incorporate these three factors in employment decisions without prejudice to the legality of such decisions. “The political compatibility exemption, while subject to broad interpretation, is intended to provide Members, Committee offices, and leadership offices with more flexibility than is available under the party affiliation and domicile exemptions.”

The jurisprudence since enactment of the CAA makes clear that in employment cases in which Speech or Debate Clause immunity is asserted, it will be up to the courts to determine whether the privilege applies on a case-by-case basis. I note that notwithstanding the CAA, the Committee on Ethics has broad discretion to discipline Members for violating standards of official conduct, which may provide another meaningful avenue to explore as the Committee of considers solutions in this area.

In conclusion, the Congressional Accountability Act of 1995 is legislation that attempted to reconcile Member intent to subject themselves to the same laws they impose on others, consistent with the legitimate constitutional protections afforded by the Speech or Debate Clause.

After more than two decades, it is important to review the CAA as well as the standards of official conduct to determine whether updates are necessary or appropriate. These are complicated issues that remain difficult to resolve.

That said, the steps the Committee took more than two decades ago mean that you now have experts, including my fellow panelists, who are available to ensure that employing authorities are appropriately advised.

Finally, I believe today, as I did then, that a commitment to taking prompt corrective action, up to and including termination, must be unequivocal.

Thank you again for inviting me to testify today. I would be happy to respond to any questions you may have.

[The statement of Mr. Crowley follows:]

**Statement of
Daniel F. C. Crowley
K&L Gates LLP**

**Before the
Committee on House Administration
U.S. House of Representatives**

**Hearing entitled
“Preventing Sexual Harassment in the Congressional Workplace:
Examining Reforms to the Congressional Accountability Act”**

December 7, 2017

Chairman Harper, Ranking Member Brady, and Members of the Committee:

Thank you for the opportunity to testify at today's hearing. My name is Dan Crowley and I lead the global financial services policy practice at K&L Gates LLP, a law firm that represents capital markets participants, leading global corporations, as well as middle-market and emerging growth companies in every major industry. However, I appear before you today on my own behalf to provide some historical context and, hopefully, some useful perspectives as the Committee considers reforms to the Congressional Accountability Act of 1995 (Pub. L. No. 104-1, hereinafter "CAA" or "the Act"). I'd like to take this opportunity at the outset to note that my comments are my own and do not represent the views of the firm, my colleagues or any firm clients.

I had the privilege of serving as counsel to the Committee under Congressman William M. Thomas (R-CA) from March, 1991 through early 1998, a period straddling the 1994 election and that comprised the later stages of the Republican Revolution. Indeed, the first plank of the Contract with America was to ensure that the laws that apply to the rest of the country also apply to Congress. Fulfillment of that promise, at least as it pertains to federal employment laws, is manifest in the CAA. However, it is important to note that these are not fundamentally partisan issues; rather they are institutional in nature. In fact, the Committee's consideration of this landmark legislation began under the previous Democratic Majority.¹ In many ways, consideration of the CAA represented the culmination of an unprecedented bipartisan focus on reforming House non-legislative operations in the wake of a series of highly publicized scandals.

The basic principles that in the past guided the Committee in this area are:

If a law is right for the private sector, it is right for Congress;

Congress will write better laws when it has to live by the same laws it imposes on the private sector and Executive Branch; and

The separation of powers embodied in the Constitution must be respected.²

The challenge faced by the Committee more than two decades ago was to reconcile these principles. At that time, it was felt that the procedures established to provide a means for redress of grievances by employees must take into consideration that, in the Congressional context, allegations can be career ending - even if they subsequently prove to be untrue. In order to assist the Committee with its consideration of reforms prompted by recent revelations, my comments will focus on the historical context of the CAA and the Constitutional provisions³ at issue.

¹ See, e.g., H.R. Rept. No. 103-650, Part 2, Committee on House Administration. 103d Congress, 2d Session, August 2, 1994.

² Id at p. 11.

³ For an excellent and more detailed discussion of these issues, see: "The Speech of Debate Clause: Constitutional Background and Recent Developments," Congressional Resource Service, by A. Dolan and T. Garvey, August 8, 2012, upon which I rely heavily throughout these comments.

Finally, I will provide some background on steps that many House employing authorities took following enactment of the CAA to prevent harassment of all forms in the Congressional workplace.

Historical Context of the Congressional Accountability Act

During my time on Committee staff, the Committee investigated a series of House scandals which resulted in public concern over corruption, malfeasance, self-dealing and patronage. These included the House Bank Scandal, involving systematic overdrafts amounting to interest free loans, as a result of which four ex-Members, a Delegate, and the House Sergeant-at Arms were convicted of wrongdoing; the House Post Office Scandal, in which the House Postmaster pled guilty and implicated two senior Members of criminal wrongdoing and a former full committee Chairman was subsequently convicted and incarcerated for embezzlement and money laundering involving trading of stamps and postal vouchers for cash; and the House Restaurant Scandal, in which large tabs were run up by Members that in many cases went unpaid for extended periods of time.

To begin dealing with such problems, on April 9, 1992, the House passed the House Administrative Reform Resolution of 1992, H. Res. 423 (102nd Cong.), which abolished the Office of the Postmaster and established the House Inspector General and the Director of Non-Legislative and Financial Services, as well as the Committee on House Administration's ("CHA") Subcommittee on Administrative Oversight to provide policy direction and oversight for these new offices. The Subcommittee was bipartisan, except that tie votes were referred to the full Committee for resolution, which effectively gave the Committee Majority final say on such matters.

These reforms were codified in House Rules at the beginning of the 103rd Congress.⁴ At that time, the Subcommittee's procedures were changed to adhere to the usual parliamentary rules in which a tie vote fails. In any such case, leadership was to be notified. By agreement between the Chairman and the Ranking Member, the full Committee delegated all relevant power given to CHA under House Rules to the Oversight Subcommittee. In other words, the Republican Minority was essentially given equal status with the Democratic Majority on matters relating to oversight of non-legislative and administrative House functions.

This experimentation in bipartisan oversight produced a number of reform proposals for improvement of non-legislative House operations. Among them was the CAA. On July 25, 1994, H.R. 4822, the Congressional Accountability Act (103rd Cong.), was introduced by Representatives Christopher Shays (R-CT) and Dick Swett (D-NH). It was considered by CHA and favorably reported on July 28, 1994, and passed the House by a vote of 427 – 4 (Roll no. 390) on August 8, 1994. However, H.R. 4822 was not considered by the Senate. Instead, CHA

⁴ House Rules & Manual, 103rd Congress, § 654.

and bipartisan leadership had planned to adopt these reforms unilaterally under House Rules. Then the 1994 election happened, resulting in the first House Republican Majority in 40 years.

Soon after the 1994 election, bicameral staff was directed to meet to iron out differences between the chambers with an eye toward enactment of the CAA early in the 104th Congress. The product of those negotiations was introduced as H.R. 1 on January 4, 1995. This legislation passed the House unanimously the following day by a vote of 429 - 0 (Roll no. 15). It was substituted for the text of S. 2 and passed the Senate by unanimous consent on January 12, 1995, then sent back to the House for consideration under suspension of the rules on January 17, 1995. S. 2 passed the House by a vote of 390 - 0 (Roll no. 16). It was signed into law by President Clinton on January 23, 1995, and became Public Law 104-1, the first law passed by the new Republican Congress.

Other than administrative and technical amendments enacted in 2015 relating to the process for appointing mediators, the CAA remains largely unchanged since it passed the House by unanimous vote (twice) in 1995. A series of recent sexual harassment allegations against Members of Congress provides a basis upon which to assess whether revisions to the CAA are needed at this point in time. The Constitutional issues that confronted Members in 1995 remain applicable and, if anything, court decisions since then have made these issues even more complicated and challenging.

Speech or Debate Clause Immunity

Article I, Section 6, clause 1, United States Constitution provides, in pertinent part:

The Senators and Representatives shall ... in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. *Emphasis added.*

The last phrase of clause 1 is generally referred to as the Speech or Debate Clause and has repeatedly been interpreted by the U.S. Supreme Court as providing immunity for Members of Congress with respect to their “legislative acts.”⁵ This protection, derived from our common law heritage and the English Bill of Rights, which was enacted in 1689 following a long struggle for

⁵ See, e.g., *United States v. Helms*, 442 U.S. 477 (1979) (excluding evidence of legislative action in a criminal prosecution of a Member of the House); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (dismissing civil suit to enjoin a Senate Committee investigation); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (dismissing a civil conspiracy claim against members of a Senate committee); *United States v. Johnson*, 383 U.S. 169 (1966) (reversing criminal conspiracy conviction based on Speech or Debate Clause immunity). Source: The Speech or Debate Clause; Constitutional Background and Recent Developments, Congressional Research Service, by A. Dolan and T. Garvey, August 8, 2012.

Parliamentary supremacy, has long been "...recognized as an important protection of the independence and the integrity of the legislature."⁶

Protected legislative acts include not only speech or debate in either House, but also other matters that are "...an integral part of the deliberative and communicative process by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."⁷

Moreover, lower courts have ruled that Speech or Debate Clause immunity attaches to employment decisions by Members in certain circumstances. For example, in *Browning v. Clerk*, the U.S. Court of Appeals for the D.C. Circuit ruled that the Speech or Debate Clause protects Members from liability based on personnel actions they took if the impacted "employee's duties were directly related to the due functioning of the legislative process."⁸

Against this Constitutional backdrop, the Committee sought to establish a procedure to address violations of the federal labor and employment laws by Members without compromising legislative branch prerogatives as a co-equal branch of government under the Separation of Powers Doctrine. Toward that end, the CAA provided for the creation of the Office of Compliance ("OOC") within the Legislative Branch and charged it with responsibility for promulgating implementing regulations, conducting studies and, importantly, carrying out an education program for Members and other employing authorities of the Legislative Branch regarding the laws made applicable to them under the Act. The Committee made clear that the OOC also has responsibility for educating employees, and informing them of their rights and the process by which they can access the enforcement procedures of the OCC under these laws.⁹

Perhaps the most significant provisions in the CAA provide for a right of limited judicial review "to set aside a final decision of the OCC Board if it is determined that the decision was –

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
- (2) not made consistent with required procedures; or
- (3) unsupported by substantial evidence."¹⁰

Jurisdiction is granted to the U.S. Court of Appeals of the Federal Circuit only "to seek redress for a violation for which the employee has competed counseling and mediation."¹¹ In a proceeding "in which the application of a regulation issued under this Act is at issue, the court

⁶ *Johnson*, 383 at 181.

⁷ *Gravel*, 408 U.S. at 652.

⁸ 789 F.2d 923 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 996 (1986).

⁹ "The Committee believes strongly these education programs are a key and integral part of the Office's mission." H.R. Rept. No. 103-650, Part 2, p. 21.

¹⁰ CAA Sec. 407(d).

¹¹ CAA Sec. 408(a).

may review the validity of the regulation.”¹² Other judicial review is expressly prohibited.¹³ Finally, Section 413 of the CAA specifically provides that this limited authorization to bring judicial proceedings does not constitute a waiver of Speech or Debate Clause immunity.¹⁴

Another important CAA provision respects Speech or Debate Clause immunity for employment decisions made by Members with respect to legislative staff. Specifically, Section 502 provides: “It shall not be a violation of any [employment discrimination] provision...to consider the - (1) party affiliation; (2) domicile, or (3) political compatibility with the employing office...” In other words, such factors provide an affirmative defense to allegations of discrimination. As described in the Committee Report:

“This provision and the exemptions listed therein recognize the special nature of employment in Congress by allowing Member offices, as well as Committee and leadership offices, to incorporate these three factors in employment decisions without prejudice to the legality of such decisions. The political compatibility exemption, while subject to broad interpretation, is intended to provide Members, Committee offices and leadership offices with more flexibility than is available under the party affiliation and domicile exemptions.”¹⁵

Although my testimony is primarily intended to provide some of the historical context that gave rise to the CAA, I would be remiss if I did not point out that case law since enactment of the CAA leaves open the question of how far Speech or Debate Clause immunity extends to personnel decisions. In one case, the 10th Circuit Court of Appeals distinguished between “legislative” acts that are entitled to immunity, and non-legislative acts that are not.¹⁶ In subsequent cases, the DC Circuit has determined that the Speech or Debate Clause does not require the dismissal of suits brought under the CAA, but it also held:

“If the employer’s nondiscriminatory reason for taking the adverse employment action is motivated by a legislative act, the Speech or Debate Clause protection may prevent a plaintiff from being able to challenge the Member’s assertion, since Members remain protected from “inquiry into legislative acts or the motivation for actual performance of legislative acts.”¹⁷

¹² CAA Sec. 409.

¹³ CAA Sec. 410.

¹⁴ CAA Sec. 413. PRIVILEGES AND IMMUNITIES. The authorization to bring judicial proceedings under sections 405(f)(3), 407, and 408 shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution, or a waiver of any power of either the Senate or the House of Representatives under the Constitution, including under article I, section 5, clause 3, or under the rules of either House relating to records and information within its jurisdiction.

¹⁵ H.R. Rept. No. 103-650, Part 2, p. 27.

¹⁶ *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2006).

¹⁷ *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 at 14 (D.C. Cir. 2006).

In other cases, the courts have held that the scope of immunity may be narrower depending on the circumstances. However, it is clear from the jurisprudence that in employment cases in which Speech or Debate Clause immunity is asserted, it will be up to the courts to determine whether the privilege applies on a case-by-case basis. In other words, absent legislative clarification about the intended scope of immunity with respect to personnel decisions, by default the courts will continue to define the scope of protection. I note that, notwithstanding the CAA, the Committee on Ethics has broad discretion to discipline Members for violating standards of official conduct,¹⁸ which may provide another meaningful avenue to explore as the Committee considers solutions in this area.

Past Steps to Prevent Sexual Harassment in the Congressional Workplace

Following enactment of the CAA, the Committee provided oversight for the OOC as they set about promulgating implementing regulations. This process was sometimes contentious as the Committee sought to ensure that Congressional prerogatives were respected, particularly when it came to proposed regulations under CAA Sec. 220(e) having to do with possible unionization of legislative staff.¹⁹ We also worked with the Office of House Employment Counsel to develop model anti-harassment policies for consideration by employing authorities. At that time, many offices implemented policies along the following lines:

The Office reiterates its commitment to preventing harassment of any kind in the workplace, including sexual harassment. The Office takes its responsibility to investigate and address any harassing behavior very seriously. All personnel must read this policy, print it out, sign where indicated below, and return it to your immediate supervisor.

All employees will be treated, and are to treat each other, fairly and with respect. Employees will not be subjected to, and will not subject each other to harassment of any kind; the office will not tolerate any kind of harassment. *Any employee who violates the anti-harassment policy will face appropriate discipline, up to and including termination.*

There are two basic forms of sexual harassment:

- (1) Prohibited “quid pro quo” sexual harassment occurs when a supervisor or manager makes unwelcome sexual advances, requests sexual favors, or engages in other verbal or physical conduct of a sexual nature, if the implication is that submission to such conduct is expected as part of the job. It would also be prohibited for a supervisor or manager to make employment decisions affecting the individual on the basis of whether the individual submits to or rejects sexual conduct.

¹⁸ Rule XI, clause 3, Rules of the House of Representatives, 115th Cong., January 5, 2017.

¹⁹ See, e.g., “Oversight Hearing: Office of Compliance,” Committee on House Oversight (n/k/a Committee on House Administration), 105th Cong., 1st Session, March 19, 1997.

- (2) Prohibited “hostile work environment” sexual harassment occurs when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive work environment. This includes, for example, displaying sexually suggestive material in the workplace, unwelcome flirtation or advances, requests for sexual favors, or any other offensive words or actions of a sexual nature.

In addition to sexual harassment, other kinds of harassment on the basis of race, color, sex, age, religion, national origin, age and disability may constitute a violation of law and is prohibited. Insults, jokes, slurs, or other verbal or physical conduct or activity relating to race, color, sex, religion, national origin, age and disability may constitute a violation if they create an intimidating, hostile, or offensive work environment, or if they unreasonably interfere with an individual’s performance.

We emphasize that it is the responsibility of each employee for compliance with the anti-harassment policy. Personal behavior and language that are “acceptable” to one individual may be “offensive” to another. All employees must recognize that the focus of a non-discrimination policy is on the *effect* of one’s actions, not the *intent*. Even an employee who believes he or she is “just kidding around” or “didn’t mean to harm” may act in ways that have the effect of intimidating or demeaning another employee, and thereby violating the policy.

Any employee who in good faith believes that he or she has been subjected to or has witnessed actions that violate the policy should promptly advise management so the office can immediately investigate and take corrective action where appropriate. An employee may advise his or her direct supervisor, or any other management official with whom the employee feels comfortable discussing such issues. The information obtained during an investigation will be disclosed only to those who have a “need to know” in order to complete the investigation or to take appropriate corrective action. Anyone who brings such a matter forward is assured that he or she will not suffer any retaliation, discrimination or reprisal for having done so.

Again, the preceding model policy was adopted by many House employing authorities two decades ago. Certainly, it is not current and does not reflect changes in law since then. Fortunately, you have real experts with current knowledge on the state of applicable law on the panel today who can advise the committee on what steps might be taken going forward.

Conclusion

The Congressional Accountability Act of 1995 is legislation that attempted to reconcile Member intent to subject themselves to the same laws they impose on others, consistent with the

legitimate Constitutional protections afforded by the Speech or Debate Clause. After more than two decades, it is important to review the CAA as well as the standards of official conduct to determine whether updates are necessary or appropriate.

These are complicated issues that remain difficult to resolve. That said, the steps the Committee took more than two decades ago mean that you now have experts - including my fellow panelists - who are available to ensure that employing authorities are appropriately advised. Finally, I believe today as I did then that a commitment to taking prompt corrective action - up to and including termination - must be unequivocal. Thank you again for inviting me to testify today. I would be happy to respond to any questions you may have.

The CHAIRMAN. Thank you, Mr. Crowley.

We now have time for Committee Members to ask questions of the witnesses. Each member will be allotted 5 minutes to question a witness or witnesses. And I will now recognize myself for 5 minutes.

And I will start, if I may, with you, Ms. Lipnic. I certainly appreciate you being here today and the work that you have done in this area of sexual harassment and antiharassment generally.

I want to focus on your work for a moment as co-chair of the Select Task Force on the Study of Harassment in the Workplace. The EEOC has created a document entitled "Promising Practices for Preventing Harassment" identifying five core principles around which prudent practices are identified.

Can you give us a little insight as to what practices would constitute an effective sexual harassment education program? And in your opinion, of that, what have you seen that works or doesn't work?

Ms. LIPNIC. Certainly. And I would tell you, Mr. Chairman, that the promising practices that are on our website are completely derived from our task force report, in the recommendations that we made in the task force report.

So there are five core principles that we think are important for preventing harassment. And again, our task force was focused on prevention. At our very first meeting of our task force, we all agreed that we all know what is legally actionable harassment, but that is not working as a prevention tool. So we focused on five things.

One is there has to be committed and engaged leadership, there has to be consistent and demonstrated accountability within an organization, there has to be strong and comprehensive harassment policies in place, trusted and accessible complaint procedures—and I would emphasize trusted procedures—and regular and interactive training that is tailored to the audience and to the organization.

And as I said earlier, we were very critical of training, much of the training that has taken place and developed over the last 30 years, as a prevention tool. But we do not by any means reject training as a tool. We believe that training is absolutely necessary. And what Ms. Lett referred to, in particular, and she said in-person training, can make a big difference.

So we have a number of recommendations about training. That it has to be customized to that particular workplace. The leadership of the organization has to show up for it and demonstrate that they are interested in it. It has to give examples to that particular workplace.

And it is very important in training that individuals in the workplace focus on training, not even so much as what is harassment and what isn't, what are the procedures by which people can report, they know who to go to, they know what the consequences will be, what will happen. That is an important component of the training as well.

The CHAIRMAN. So this is not going to be effective or as effective unless the person at the top—

Ms. LIPNIC. Absolutely.

The CHAIRMAN [continuing]. Says this is going to be the way that it will be.

Ms. LIPNIC. Yes. And I have spoken on this in many places. And you will oftentimes here, in particular, outside counsel who are called in to do trainings at corporations, and the head of the business unit or the organization will show up for the very beginning of the training and say, "I want you all to pay attention to this," and then leave.

And so, you know, the leadership of the organization has to be as committed to it and as engaged in that training and send the message to the individuals who are receiving that training.

The CHAIRMAN. Thank you very much.

If I could now, Ms. Lett, I would like to ask you a couple of questions in the time that I have left.

Would you describe OHEC's role in the counseling or mediation phases? And specifically, is OHEC retained by an employing office when counseling is initiated or when mediation begins, or does OHEC already have an attorney-client relationship with the House office prior to being notified of a CAA claim?

Ms. LETT. I am going to give you a lawyerly response, and that is, it depends. In many instances we will know when a complaint is coming down the pike, and that is because the employing office has contacted us. There has been an employee who is dissatisfied with something that is going on in the workplace. They have attached it to a discriminatory motive. And we work with the office to try to address the situation.

Sometimes an employee will have an employment performance issue. They have been put in a performance improvement plan. That hasn't worked out. The employee is terminated. And so we work with the office through that entire process and anticipate that when the employee loses his or her job that they are going to go to the Office of Compliance.

We anticipate that. We don't know when someone has gone to the Office of Compliance initially for the counseling phase, because that is confidential unless the employee waives it.

When mediation is requested, then we would be notified automatically. Again, we might know about that ahead of time that it is coming down the pike or for the first time when we get the notice of mediation. And of course, at the mediation phase we represent the employing office and attempt to resolve the matter at that point.

The CHAIRMAN. Okay. Thank you very much. My time has expired.

The Chair will now recognize Mr. Brady for 5 minutes.

Mr. BRADY. Thank you, Mr. Chairman.

For Gloria Lett, of all the cases you handle, how much of your work is focused on sexual harassment?

Ms. LETT. I anticipated that question. And I have a list here in terms of the number of cases and the categories in which they occur. We typically see mostly retaliation cases because when employees file claims they always put in a—well, always—they routinely will include a retaliation claim.

Followed by retaliation is the Americans with Disabilities Act claims, race claims, Fair Labor Standards Act claims, age, Family

and Medical Leave Act. And sex discrimination, gender discrimination cases come in at about the same rate. It is followed by sexual harassment claims, pregnancy claims, national origin, and military discrimination claims come at about the same rate. And then finally, claims based on color.

Mr. BRADY. Do you support eliminating the cooling-off period?

Ms. LETT. I don't have a strong position on that one way or the other. My only caution about eliminating that 30-day period is that oftentimes we do settle cases during that period. So it would take away another opportunity to possibly resolve a case before a party goes directly into litigation.

Mr. BRADY. In your advocacy for employment offices, do you find that just your engagement, the engagement that you are engaged with, changes office behavior in the future?

Ms. LETT. I think it is difficult for us to know to a certainty whether that is happening, but it has been reported back to us that when there has been an incident of some kind or some allegation of discrimination and an office speaks with us and tries to take appropriate action, we do action items, after-action items with the office.

That might involve training for a particular individual. It might involve training for the entire staff. It might mean, in some instances, and not all House employing offices have written policies, so it might mean sitting with them, adopting those policies, rolling those policies out with the employees, and having conversations going forward.

So I do think that there is a lot of positive that comes out of some of these situations.

Mr. BRADY. Thank you.

And for Mr. Crowley, thank you for your service on the Committee, and I understand you worked with my former counsel, Charlie Howell.

Mr. CROWLEY. Yes, sir.

Mr. BRADY. Who was a real gift to the members of this Committee in drafting the CAA.

Why did Congress exclude the Library of Congress from some of these protections? Was that a mistake? And should we fix that and include now the Library of Congress?

Mr. CROWLEY. You know, Congressman, I have to tell you that my recollection of these issues is now 22 years old, and so I don't remember every discussion we have.

Mr. BRADY. I can appreciate that, sir.

Mr. CROWLEY. Yeah. I do recall a number of conversations involving the Library, including whether the police forces ought to be unified. I don't remember the specific discussion about the Library, although I think the answer might be, and I would defer to my colleagues, that they were already covered to a certain extent under Federal law, if I am not mistaken.

Mr. BRADY. Yes?

Ms. GRUNDMANN. Perhaps I can provide a little insight. The Library of Congress does have its internal personnel system, but that system is entirely internal. There is a hearing process in the Library of Congress, but the hearing officer's decision is merely a rec-

ommended decision. It must be forwarded to the Librarian, where she can either accept or reject that decision.

Mr. BRADY. Do you think we should include the Library of Congress in this ongoing hearing and discussion and maybe a bill?

Mr. GRUNDMANN. We do.

Mr. BRADY. Thank you.

Ms. Lipnic, in the June 16 report you write about the risk factors in the workforce. Among them are many young workers in offices with significant power disparities. Congress is obviously a dramatic example of both of those risk factors. We passed a resolution focused on training recently, but no one believes that training is enough.

And this hearing is about improving our laws, and that is important, but it is also not enough. We really need to change the culture.

So based upon your experience, beyond providing training and changing laws, what other work can we do to change that culture?

Ms. LIPNIC. Thank you, Mr. Brady.

One important point that I think the Committee should consider as you are looking particularly at revising the Congressional Accountability Act, and I would look to the testimony from Congresswoman Speier from your November hearing: There is a difference between what immediate action has to be taken when someone is concerned and complains that they are being sexually harassed versus what is all of the process that the Office of Compliance deals with and the House Employment Counsel when you are looking to is there liability.

And so as Representative Speier said, you have to be concerned about what is happening to that person who has complained about it when she is still sitting there in that workplace.

So I would urge you to sort of bifurcate your thinking on this and understand that that immediate action and that investigation that has to take place, which I think that the House Employment Counsel, I understand from the testimony, does a lot of that, you should consider how detailed can you be and how can you instruct your work environment as to how you want to deal with those immediate issues of harassment.

Think of harassment claims different from other types of discrimination claims. So it is one thing to allege you did not get promoted to a particular job in an office based on your sex. That is very different than a harassment complaint and a harassment claim.

And so the immediate investigation that has to take place, which may be referred to the House Employment Counsel's office, or maybe the Office of Compliance does that, I would urge you to think about what is that process and what is that type of corrective action that is taken immediately.

That, again, is very different from all of the other process that is in place that determines is there liability here. So that is one thing that I would urge you to think about.

And your focus on culture is very much what our select task force spent a great deal of time on. And there are a number of things that will influence a culture, again, including what is the message that is being sent from the top and is the leadership of the organi-

zation owning each individual workplace. And of course workplaces in Congress, you have a lot of—as you mentioned, the number of risk factors—you have a lot of young people, you have people working in very close quarters, you have people working very long hours.

I think there is a recommendation maybe in one of the bills that you do a culture—a climate survey. Those are things that you can also consider and make sure that you are reviewing those things on a regular basis.

But culture and the message that is sent from the leadership and the engagement within each individual office to address that are very important factors and can do the most to act as a prevention tool.

Mr. BRADY. Thank you. I thank all the witnesses for being here and for your testimony, very important and educated testimony.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. Thank you, Mr. Brady. The gentleman yields back.

The Chair will now recognize the Vice Chairman of the Committee, Mr. Davis, for 5 minutes.

Mr. Davis. Thank you, Mr. Chairman.

And thank you to all of our panelists.

Ms. Lett, it is great to see you here again.

Thank you all for your testimony.

To begin, I believe an important takeaway from our previous hearing is the need for the OOC and OHEC to become more familiar with the policies and procedures not only of the workings of both of your organizations but, really, how the Ethics Committee process work as well. I also encourage more outreach to the Hill in general so you have a sense of how best we can all work together to serve and improve this great institution.

I want to focus my questions today, though, on Ms. Grundmann, and I really want to focus on OOC's outreach to the Hill.

Your testimony discusses the need for new employees to receive training. How is the OOC currently reaching new employees with this information?

Ms. GRUNDMANN. We have a very unique mandate. In fact, we are compelled to train on our statute by the law. And it is a very robust program, for a very small office, that is administered largely by two people.

As I stated in my opening statement, 500 people have been trained in person in the last 6 weeks. Our online training module has soared in recent times, and here is an example: In September, five people completed the online training module for sexual harassment prevention training. In October, it was 618. In November, it was over 4,000, with 800 people arriving just last week.

So, in addition to this type of training, we are developing new training. Coming on December 10 is a new comprehensive online module that talks about anti-harassment, anti-discrimination, anti-retaliation. In production right now is an overview orientation of the Congressional Accountability Act. We have a new module coming up, as well, that will focus on how to report sexual harassment, how to respond to sexual harassment, and behaviors that could lead to sexual harassment.

In addition, let's talk about new employees. We don't know who these new employees are. We would love to be notified as to when new people are onboarded so that we can communicate with them directly——

Mr. DAVIS. So let me get this straight. There is no contact between our office of—our payroll office here at the House of Representatives and your office when a new employee comes on board?

Ms. GRUNDMANN. That is correct.

Mr. DAVIS. Okay.

You mentioned in your testimony, too, you wanted to reach more younger staffers.

Ms. GRUNDMANN. Yes.

Mr. DAVIS. Are you seeing the younger staffers taking these training modules that you just mentioned in the last few months? Or do you show by age—and how are you going to reach more younger staffers?

Ms. GRUNDMANN. Well, let me answer that question. We don't know exactly the age or the person that is taking the module; we just know the hits that we are receiving.

What we could explore doing—and we could do it with this committee and the members of this panel—is a particular module designed specifically for new employees and younger employees. They do face different issues.

Mr. DAVIS. Okay. I think it is a great point that there probably needs to be more communication between our offices that are run by the CAO and the OOC to make sure that those modules are out there and the training is in.

I also think it is important that we develop training for senior managers, because they are going to be the first ones that an employee will go to to address the process, and I think our senior managers need to know a little bit more about the process. How can we address that?

Ms. GRUNDMANN. Well, there is actually a module in place right now on anti-discrimination, anti-harassment, and anti-retaliation that actually meets the standards for managers in the Senate. It is a resolution that passed recently. So it is there already.

Mr. DAVIS. Well, excellent.

And, in your testimony, you talked about how you hope to strengthen OOC and your outreach programs. We look forward to working with you to do that.

I do want to point out that the author of the Congressional Accountability Act, our former colleague, Chris Shays, is in the audience today.

And thank you for your work on this, Congressman Shays.

I do want to point out, while I have a little bit of time left, Ms. Grundmann—and I notice that we have many of your annual reports that will come out every couple of years. There wasn't a lot of focus in the 2016 report on sexual harassment in the workplace. And I would hope, as we move forward, that the OOC and those who make up the agency would help us help you identify how we can better serve all of our employees at all levels and also understand how we can get anybody who may be a victim in front of you, in front of the office, and on the path to get the problem rectified. That is the goal.

And I appreciate you being here.

Ms. GRUNDMANN. Great. We couldn't agree with you more.

Mr. DAVIS. Thank you.

I yield back.

The CHAIRMAN. The gentleman yields back.

The Chair will now recognize the gentleman from Maryland, Mr. Raskin, for 5 minutes.

Mr. RASKIN. Thank you very much, Chairman Harper.

So I think I want to begin with a question with Ms. Lipnic.

The less power in equality that women have in the workplace, the more vulnerable they are to sexual harassment. I think we have to take it as both a sign and a cause of progress here that we have 84 women, I think it is, in the U.S. House today and 21 in the Senate. One can only imagine the conditions of sexual harassment when the Senate and the House were all male, or virtually all male.

But I saw an interesting comment by Barbara Ehrenreich, who has noted kind of a class bias in the sexual harassment discussions that we have been focused on, lots of women who are in professional jobs. And she said people are not talking about the hotel workers, the farm workers, the waitresses who face rampant sexual harassment and so on.

And I am just wondering, is there anything that we can do that will benefit everyone, if not in the same legislation, necessarily, but are there policies we can advocate that will actually make a change for people across society?

Ms. LIPNIC. Thank you for that question.

So, in our work at the EEOC, you are absolutely right. I mean, we see harassment claims across industries, across income levels, from the executives suite to the factory floor, to the farmers' fields. We have had horrendous cases of harassment for particularly vulnerable workers.

That is part of the reason why, when we put our task force together, we included representatives from worker advocacy groups. So, certainly, things that are more outreach along those lines and that recognize the work advocacy groups, worker advocacy groups, can play and how individuals who are in vulnerable work situations can go to those organizations and seek some redress.

You know, certainly one thing to consider—and this is something that we have in the Federal sector—is requirements that information is provided in different languages so that, you know, you are reaching populations, particularly for vulnerable workers, who English may not be their first language. So that is certainly one thing to consider.

In terms of legislative changes, in terms of Title VII, I am not sure that there is—I am not sure that there is anything that I could recommend right now, and I certainly would be happy to give more thought to it.

Mr. RASKIN. Okay. Let's pursue that—

Ms. LIPNIC. Sure.

Mr. RASKIN [continuing]. If we could. And I thank you very much.

Ms. Lett, let me ask you, you began by mentioning this interesting article, which I saw too, "Question My Story" by a victim of

sexual harassment. And you invoked her description of gray areas and the lack of third-party witnesses and so on.

And it brought to mind the F. Scott Fitzgerald saying that the sign of first-class intelligence is the ability to hold contrary thoughts in your mind at the same time and still conduct yourself effectively.

And everyone agrees we need zero tolerance, and everyone agrees we also need a process that is fair to the victims and fair to the accused. The problem is that people today think that our process is so cumbersome and convoluted that its purpose is not to discover the truth but somehow to bury the truth or to complicate the truth. That is, at least, the public perception.

And so can we do to make sure that we do have a process that is fair, that is perceived as fair, but also moves things quickly enough so that people see that we are taking the issue seriously?

Ms. LETT. Well, as I mentioned before when I was asked a question about the cooling-off period, I don't have a practical reason to think that that is not a good idea. Certainly, it is not going to change how we do business. And so eliminating, possibly, that particular piece of the process might be helpful.

I do think that there—and I know that the Office of Compliance can speak more to this, but—

Mr. RASKIN. Just to be clear, you were saying that we don't need the cooling-off period?

Ms. LETT. From my perspective, I don't think it is needed. As I said, the one reservation I have is that it does provide an additional chance to resolve a matter before a full-blown litigation begins.

I do think it is important to communicate to employees their rights. That is not my job, not our office's job. And I know that there have been, over the years, efforts by the Office of Compliance. I remember when I first started on the Hill, we would get paychecks, and there would be communication about the Office of Compliance and our rights under the Congressional Accountability Act. So more efforts, of course, to train employees, to make them aware of their rights, and ongoing communication, I think, would be helpful.

I have to say, the plaintiffs' bar is very savvy about these rules, and, typically, employees don't have problems getting attorneys representing them. Most of the concerns I have heard is that the process is lengthy. So eliminating the cooling-off period would be helpful.

Mr. RASKIN. Thank you.

Mr. Chair.

The CHAIRMAN. The gentleman yields back.

The Chair will now recognize the gentlelady from Virginia, Mrs. Comstock, for 5 minutes.

Mrs. COMSTOCK. Thank you, Mr. Chairman.

I wanted to focus on what you cited, Ms. Lipnic, as one of the best prevention methods, which is the trusted complaint procedures.

Now, we have the procedures that by law you are required to have. So I appreciate, Ms. Lett, as you laid out, you know, you have to deal with both sides. But we have been talking about and

I think a number of us have talked about having some type of victims advocate, having a separate person for the victim, whether it is an ombudsman, an advocate, a victims counsel.

Wouldn't that help, if we had somebody where the victim can go—and even if they have had the training, you know, when you are in that situation—you know, I mean, we have special people for rape victims, they then go, and you are walked through the whole process at that point when you are in crisis.

So if we could have somebody that they could go to in that type of situation, wouldn't that improve the whole dynamic of the experience of the victim, putting them on a level playing field and helping them through this process?

I will start with you, Ms. Lipnic.

Ms. LIPNIC. Sure. I think that is a very valuable suggestion.

One of the things I would tell you, that when we were doing the work of the task force, we actually invited people from the Pentagon, from the Defense Department, because of what they have been dealing with for the last, you know, 14 years and their own internal procedures as to sexual assault in the military.

And so having a victims advocate is something I know that they set up there, and I would urge you to maybe consult with, you know, the generals there who have been dealing with that, and they would have more experience with that.

But that is something that—I think your focus on addressing the immediate situation for the person, what can help them in that immediate situation, how will they know what is going to happen, and what is the corrective action that is taken immediately, needs to be a big focus.

Mrs. COMSTOCK. Okay. Thank you.

And I know that is in Congresswoman Speier's legislation and Congressman Byrne had talked about that. And I do want to thank Ms. Bertucci again, because when I had asked her, with her situation, what could we do that would have helped, an ombudsman, a counsel, an advocate was the single thing that she identified that I do think—just thinking about that experience, I think it is very important that we get that in the legislation and then also have that be, you know, imbued through the training also.

Perhaps on the training process, too, you know, when someone sets up a House account and they are a new employee, maybe we can have more socialization in getting information directly to them in multiple methods, not just, "Here is a class you can go to," but let's make sure we are getting, you know, more information out that way.

And then I wanted to—I guess the Office of Compliance. I know you are continuing to go through the records and to give us the information on the overall cases.

And I think, Ms. Lett, you went through the type of cases you are getting.

But given the public's concern and, sort of, the public right to know about what type of cases you are dealing with, and particularly, you know, when Members are involved and/or Members' staff, do you estimate you will have that information soon so that we can have that available for the public in whatever legal way you are allowed to have it, have a much more detailed accounting?

Ms. GRUNDMANN. A couple things. Let me just address the victims counsel just specifically, because it was part of our statement.

We understand that during at least the counseling stage and certainly in the mediation stage, when the employing office is represented by OHEC, that the victim feels entirely alone and is at a severe disadvantage. So what we have proposed to do is really beef up the counseling stage so the counselor actually actively participates in technical advice, in drafting a complaint.

That coupled with investigatory authority given to our general counsel to immediately investigate these claims as it emerges can be a form of advocacy on behalf of the employee.

But in response to your question—and this actually dovetails into Mrs. Brooks' request to us regarding the ethics. We provided a response this morning. The law as it is currently written is difficult for us to produce this kind of information, because we know that in counseling it is a strict confidentiality, and that binds our office from discussing it. The employing office, as Gloria Lett said, is not told.

In mediation, there is also strict confidentiality. And that specifically adheres to the products, the materials that are produced in mediation. And that is, again, strictly confidential, but it is not unusual in our process. Mediation is private throughout the industry.

What our law specifically requires, in terms of producing information in the rules, is numbers and types of inquiries that come to our office, number and types of initial requests for counseling, numbers of covered employees to the complaints they file, the claims they raise, and the disposition of those claims.

In terms of disclosure to Ethics, we, to our knowledge, have not received any requests up until this recent one, so we appreciate the concern. The law as it is currently written only allows us to disclose this type of information in a very narrow circumstance, under two conditions: when the case reaches a final decision and the employee is consulted. So, in the event that we cannot release documents with respect to counseling, mediation: where there is no final decision and when the employee has not been consulted.

Having said that, we would like to work with this committee to change that rule. And a potential change really goes towards granting us the authority to investigate claims. If the general counsel were granted that authority, it would be similar to what we have in ADA and OSHA. The general counsel, at that point, could find—if there is reason to believe that the law had been violated, a report could be generated. And that report could be made available to you.

Mrs. COMSTOCK. Okay.

And, Mr. Chairman, I would just mention, I hope we can get much more detailed information, and if we need to make changes to allow you to do that, because if we are going to correct the process, we need to know what has happened, where the complaints have been.

I noted the committee got a report on November 28, a memo, detailing from 1997 to 2007, where it laid out that 90 percent of the cases were with the Architect and the Capitol Police—probably a lot of safety things.

But I think we need to know what are the type of cases and then when Members or Member offices are involved and how we are going to do that going forward.

But I think the public has a right to know that, going back, and, certainly, going forward, how we can improve that transparency. So I hope you can work with us on that in getting more detail.

Ms. GRUNDMANN. Understood.

The CHAIRMAN. The gentlelady yields back.

The Chair will now recognize the gentlelady from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you.

And my apologies for being tardy. The FBI Director is over in the Judiciary Committee, and I had to be there for a bit. And I think my colleague Mr. Raskin has the same conflict.

This, obviously, is a very serious matter for us. And we are, I think, very clearly going to change the procedures and the statute that we have. So the question is how to do that, how to avoid pitfalls.

And one of the things that I am interested in is the recommendation that you have made, Ms. Grundmann, on the additional powers for the general counsel that you just referenced, specifically how the counsel would use those investigative powers to get to the facts of the matter that you currently can't do.

What conflicts might exist if that were assigned to you? And could you more fully explain that to us?

Ms. GRUNDMANN. Absolutely.

Rather than reinventing the wheel, we propose to use the internal mechanisms that we currently have. And the general counsel, as we state, does have investigatory authority in certain areas, such as in OSHA and ADA.

And how that really works is a claim can be filed anonymously, which is unusual. It is not the same in the labor forum. But the current practice would be we would work, the general counsel would work with the employing office. Now, clearly, that is not going to work in this particular circumstance. But, in the investigation, there is a move towards resolution. Because in OSHA cases and ADA cases, there are a lot of dollars involved, so there is a significant amount of negotiation and discussion.

If the matter is not resolved, it could result in the filing of a complaint by the general counsel. The general counsel actually represents the employee, in this case, in moving the case forward. That is the process we envision putting into effect.

The reports are not made public. And they are given to the party that can control the outcome, who can fix the outcome, if you will.

So the process is in place. The concern we have is the lack of staffing. We don't know how great the volume will be—

Ms. LOFGREN. Right. Of course.

One of the things that I think—we want more transparency on some of this. I mean, if you have an employer-employee dispute—for example, under the act that we adopted in 1995, certain employees are exempt from overtime and certain employees aren't, just as in the private sector. You could have a dispute about that category and a fight about overtime. I don't know that that needs to have the same level of disclosure as a sexual harassment thing.

We want to stomp that out, and part of the way to do that is to have some daylight on this process.

So one of the things I have been thinking a lot about—and, certainly, my colleague Ms. Speier has done the work on this bill, but it is a beginning point—how do we make this transparent in a way that protects the victims who want to maintain their privacy, but some victims are bullied into a confidential agreement.

So I am just wondering in terms of what other people in an office where there is sexual harassment, what their role is, what their obligation is, and are they constrained by these agreements that are being undertaken right now.

Ms. GRUNDMANN. So part of our training in the future, coming soon, will cover bystander training—specifically, how do people who view this type of activity, what do they do. And I think that is something Representative Speier has previously mentioned in terms of our training. It is a hard area for us to deal in. The confidentiality that is currently in the rules prohibits us from having a conversation—

Ms. LOFGREN. Yeah, but we can change those rules.

Ms. GRUNDMANN. And let me urge this committee, as you go about changing these rules, one of the communities that you need to reach out to really is the plaintiffs' bar and the employee representatives.

Ms. LOFGREN. Right. And we are doing that.

Ms. GRUNDMANN. Let me also talk a little bit about what we hear on nondisclosure agreements. That is a very confusing area, but we have a very simple answer. We don't require nondisclosure agreements. It is a product of the parties. We don't provide standardized language. And we don't require anybody to sign a nondisclosure agreement to come into our system.

Ms. LOFGREN. All right. That is important, but, certainly, the inherent power differential between, say, a Member of Congress who is harassing and a staffer who has been harassed is pretty extreme.

Ms. GRUNDMANN. Absolutely.

Ms. LOFGREN. And I read an article recently about a young woman who stepped forward and has never been able to be employed again, even though she did the right thing. So, certainly, we need to get our heads around how to protect victims even beyond a settlement agreement.

And I see my time has expired, Mr. Chairman.

Thank you very much for your testimony.

The CHAIRMAN. The gentlelady yields back.

The Chair will now recognize the gentleman from North Carolina, Mr. Walker, for 5 minutes.

Mr. WALKER. Thank you, Mr. Chairman.

Again, I would like to thank Representatives Bradley Byrne and Susan Brooks for the leadership not just on this committee but the example that you set in our entire conference.

I have a couple questions for Mr. Crowley.

It has come to our attention that Federal agencies are required to reimburse this judgment fund for judgments against agencies and settlements for discrimination in the workplace, yet there is no comparable requirement for Congress.

So, when we talk about liability, what discussions were held prior to or during consideration of the Congressional Accountability Act regarding personal liability for settlements and final judgments awarded under the CAA?

Mr. CROWLEY. Well, Congressman, again, my memory is two decades old here, but—

Mr. WALKER. I understand.

Mr. CROWLEY [continuing]. As I recall, there was a very clear discussion early on that would have simply prohibited personal liability for Members, as well as punitive damages.

That changed, as the process unfolded, to limiting the ability to pay judgments out of the new fund that was created. And, of course, those discussions occurred extensively with the Subcommittee on Legislative Branch Appropriations, who had a significant input into that decision.

But I think the general notion was that, first of all, it is not the Member personally, it is the employing office of the Member, so that, for example, if a Member leaves office, there would still be the ability to get restitution from the office after the fact.

Mr. WALKER. Okay.

Mr. CROWLEY. So I think it would be aberrational to hold Members personally responsible when, in fact, it is an employing office of the Congress for all other purposes, including the Federal Tort Claims Act, et cetera.

Mr. WALKER. Okay. All right. You covered, actually, the second part of that question, so let me then ask this: Is there any provision in the Congressional Accountability Act or in House rules that would forbid the use of the MRA funds to pay for a settlement reached at any point during the dispute resolution period?

Mr. CROWLEY. I am not sure there is a clear answer to that question. There is, in the statute, a limitation on what funds can be used to settle claims. But, of course, Members have broad discretion over the use of the MRA, and I imagine that, in certain circumstances, particularly when part of the settlement involves reinstatement to a position, that implicitly the MRA would be used.

Mr. WALKER. Yeah. And I can't imagine that that wasn't part of the discussion, with the authority that a Member would have. And even going back to those years, the budgets for staffing were much higher than they even exist today. You know, a 2-week settlement or a month for conflict resolution or maybe an employee didn't fit, but the authority or the ability to cover up such office behavior, wrongdoing, harassment, leaves a lot of discretion in the Members' hands.

So is that what you are telling me, that there can be a separate settlement or payment outside of the Congressional Accountability Act using the MRA?

Mr. CROWLEY. I think Members implicitly have that authority. But you have to remember that, at the time—the MRA didn't exist until Bill Thomas created it. Before that, we had the Clerk Hire Allowance and roughly a dozen different allowances that were consolidated with the specific intention of giving Members discretion on how to deploy those resources, to such an extent that the committee was actually renamed from the Committee on House Administration to the Committee on House Oversight to emphasize the

fact that it was not going to be determined at the committee level but by the individual Member.

And so I think that there is some conflict between the Congressional Accountability Act language and the inherent authority that Members have over the MRA.

Mr. WALKER. Your testimony highlights the Speech or Debate Clause within the Constitution. Can you explain to the committee how this clause has been interpreted by the Supreme Court in its applications within the context of the Congressional Accountability Act?

Mr. CROWLEY. Yes, sir.

The lower courts—I don't think the Supreme Court has ruled, but the lower courts, the D.C. Circuit in particular, has ruled that the Speech or Debate Clause does not preclude suits under the Congressional Accountability Act, but there still remains the immunity that is essentially an affirmative defense that Members can assert.

And so we have created sort of a gray area. You know, stepping back to the original discussions around the act, there was case law saying that it is unclear whether Congress can waive its constitutional privileges, but any waiver would have to be explicit and unequivocal.

Mr. WALKER. Yep.

Mr. CROWLEY. And I would have to say that in the Congressional Accountability Act we equivocated.

Mr. WALKER. And one last question. It is a simple "yes" or "no," Mr. Crowley. Do you believe it is wrong for Members to use the MRA to settle interpersonal sexual harassment claims?

Mr. CROWLEY. My personal opinion?

Mr. WALKER. Personal opinion.

Mr. CROWLEY. That the taxpayers should not be on the hook for that.

Mr. WALKER. Thank you.

With that, I yield back, Mr. Chairman.

The CHAIRMAN. The gentleman yields back.

The Chair will now recognize the gentleman from Nebraska, Mr. Smith, for 5 minutes.

Mr. SMITH. Thank you, Mr. Chairman.

Thank you to your witnesses. And I certainly thank you for this interaction today among members, and certainly a very serious topic.

It is interesting, I appreciate my colleague Mrs. Comstock's recommendation for a victims advocate. And if each of you, starting with Ms. Grundmann and Ms. Lett, if you could express how that might be able to be brought into the existing process, what changes might need to take place so that, if that is the decision, to make changes, if that would work and how that might work.

And then, Ms. Lipnic, if you could perhaps express your knowledge of how that has been done elsewhere and how effective it has been.

Go ahead, Ms. Grundmann.

Ms. GRUNDMANN. Sure.

What we propose really is beefing up what we already have, rather than throwing out what we have and creating a separate office.

We could take the counselor's position and actually make it a much more interactive process with the employee, whereby the counselor would help technically advise the employee on how to draft a charge or a complaint, coupled with using the general counsel and giving him the authority to investigate claims in the dispute resolution program.

If the general counsel were to find that there is a reasonable cause to believe that the law were violated, he would actually represent the employee in further administrative processes.

Mr. SMITH. Thank you.

Ms. Lett.

Ms. LETT. I would have to think a little bit more about how it would work, in terms of the specifics. But I can tell you that it would likely be a welcome thing, from my clients' perspective, in that I think an advocate would encourage employees to come forward sooner rather than later.

That would be music to our ears, certainly, because the sooner an employer knows that there is an issue, the sooner they can address it. It is not a good model when things barrel way down the track and an employee feels that he or she has—he or she—has to go to the Office of Compliance for relief. So I think there absolutely could be some upside to that.

Mr. SMITH. Okay. Thank you.

Ms. Lipnic.

Ms. LIPNIC. Mr. Smith, all I would add is, by the time people are coming to the EEOC to file a charge of discrimination, at that point we are investigating for liability purposes. So there is no victims advocacy role on the part of the EEOC itself.

Mr. SMITH. Okay. Thank you.

Mr. Crowley, do you wish to comment?

Mr. CROWLEY. Well, I think it is an interesting idea. It is amazing to me the extent to which the issues haven't fundamentally changed. The intent at the time was to create a process that would both encourage victims to come forward and allow for resolution in a way that didn't incentivize politically charged claims immediately before an election. And so anything consistent with those objectives, which this sounds like this might be, seems worth pursuing.

Mr. SMITH. Okay. Thank you.

I yield back.

The CHAIRMAN. The gentleman yields back.

The Chair will now recognize the gentleman from Georgia, Mr. Loudermilk, for 5 minutes for questions.

Mr. LOUDERMILK. Well, thank you, Mr. Chairman.

And thank you all for being here.

Of all the issues that I ever thought I would be dealing with when I ran for Congress, this is not one of them. And, in fact, it sickens me, the idea that the most respected legislative body in the world's reputation is being tainted by us discussing this. But it is extremely important.

And it boils down to character. And, in reality, there is nothing we can do to affect someone's character, but we can remove the

bushes that allow the bad characters to hide behind. And I think that is kind of the direction that we are looking.

Ms. GRUNDMANN, in your testimony, you described in detail OOC's process and make several recommendations. But one of the areas that you didn't really address is OOC's rule in administering the award settlement fund. Can you kind of take us through your role in the payment process once the tentative settlement is reached or a final judgment is received?

Ms. GRUNDMANN. Absolutely. But, first, if you will allow me to clarify. The statute refers to funds that are appropriated by the Treasury. In actuality, there is no fund. It is an account, and that account is empty until we requisition the funds for a particular award or settlement.

And, also, to be clear about this settlement account, the \$17 million we have talked about, yes, it covers awards and settlements from our dispute resolution process. It also covers awards and settlements from district court. It also covers settlements and awards that derive out of the arbitration process for various collective bargaining agreements in the legislative community, such as at the Architect of the Capitol and at the Capitol Police.

Mr. LOUDERMILK. Okay. Can I ask one quick question?

Ms. GRUNDMANN. Sure.

Mr. LOUDERMILK. And we will get back to this. It is a zero-dollar account. When something occurs like we are talking about here, where does the money come from?

Ms. GRUNDMANN. We actually requisition it. The account is empty until a settlement comes through, and then we ask for the money through the vehicle of a warrant, which should be familiar to this committee.

Mr. LOUDERMILK. Right.

Ms. GRUNDMANN. Our role in settlements is purely ministerial. The parties negotiate the terms. It is incumbent upon them to agree. It is incumbent upon OHEC to secure the proper authority from this committee when settlements come out of the Treasury for the House.

But should Congress desire to beef up our role, for instance, by giving us a greater review for legality of these decisions, you would have to change the act. Currently, we don't have the authority. The only thing we look for is whether it is signed by the parties and it is a written statement.

Mr. LOUDERMILK. Can you kind of walk me through this process of, say, this zero-dollar account? You receive notice of a settlement of X number of dollars. Then you request, through a warrant, that much money.

Can you start at that point? Walk us through who sends the money to the account. Is it the Treasury? Is it from House Appropriations? And until the individual who filed the complaint receives the check, what is that process?

Ms. GRUNDMANN. Let's take one step back.

Mr. LOUDERMILK. Okay.

Ms. GRUNDMANN. When the settlement is reached, the award comes to our office. We review it for two things: in writing and signed by the parties. That is it. And clarity, essentially.

That settlement agreement then goes to our case administrator. She obtains payment information from the parties who will receive payment—routing information, banking information.

Then the document moves down the hall, and it goes to our budget officer. She actually requisitions the funds—this is the account we are talking about—through the vehicle of the warrant.

And once the funds are there, the settlement agreement actually goes to a fourth—

Mr. LOUDERMILK. Who do the funds come from?

Ms. GRUNDMANN. They come from Treasury.

Mr. LOUDERMILK. From Treasury. Okay. Thank you. Sorry.

Ms. GRUNDMANN. And then the final step that we have in this process is the agreement goes to a fourth person to check that all the information is correct, the routing information. And then the funds are released.

At that point, our involvement with the fund ends. We do not determine when the person is paid. There could be an offset, for instance. But we are done with the process.

Mr. LOUDERMILK. Okay.

Is there any other process in there to where anyone in Congress notified of a settlement, has to sign off on it? Or is it just within your office?

Ms. GRUNDMANN. Other than rule X, which governs this committee, whereby the Chairman and the Ranking Member have to sign off on particular settlements that come out of this account, that is the only rule.

Mr. LOUDERMILK. So, in that process, then, the Chairman and Ranking Member do sign off on that?

Ms. GRUNDMANN. That would be a good question for Ms. Lett.

Mr. LOUDERMILK. Okay.

And, Ms. Lett, in the few moments left, could you answer that question?

Ms. LETT. The answer is yes. If there is a settlement that comes out of the Treasury, that has to be approved by this committee.

Mr. LOUDERMILK. Okay. Thank you.

Mr. Chairman, if we do other questions, I have some others, but I will yield back at this point.

The CHAIRMAN. The gentleman yields back.

The chair will now recognize Ms. Speier for 5 minutes for questions.

Ms. SPEIER. Thank you, Mr. Chairman.

Mr. Chairman, it has been said a couple of times and I just want to underscore the importance of having the plaintiffs' bar appear before the committee, as well, to hear from them how the process has or has not been working so we can refine it moving forward.

To the last question that Mr. Loudermilk just raised, it was my understanding in one article that I read that the former chair of this committee declined to approve any sexual harassment cases, and, as a result, the MRA started to be used for that process.

Is that your recollection, Ms. Lett?

Ms. LETT. That is not exactly accurate. There were more than sexual harassment cases that were not approved.

Ms. SPEIER. Well, maybe so. But were there sexual harassment cases in which the former Chair declined to sign off on—the Rank-

ing Member was not made aware of. That is how it was reported, and I am trying to get clarification.

Ms. LETT. I don't remember the exact number. It may have been one or two, but it certainly was not more than that.

Ms. SPEIER. So if it is not signed off by the Chair, then there has to be another way in which the settlement is reached. And that, in my understanding, is how the MRA has been used in some cases.

Ms. LETT. That is correct.

Ms. Speier. I want to focus back on the victim. One of the problems—and you made mention of it, Ms. Lipnic—is that you have a victim who has come forward, is concerned about the fact that she has been sexually harassed, either by the Member or someone in the office, but she has to continue to work in that office in order for it to be resolved through the Office of Compliance. If she doesn't continue to work in the office, then the Office of Compliance has no role, correct?

Ms. GRUNDMANN. Oh, you are talking to me? I thought you were talking to Ms. Lipnic.

There is a concern that we haven't discussed here today, and that really is about retaliation. You know, the employee has filed a claim—

Ms. SPEIER. That is what I am getting to.

Ms. GRUNDMANN. Perfect.

Retaliation is covered currently under the CAA, in that an employee who has come to our office, experienced some sort of retaliation, would have a separate claim.

But here is how the process works. The employee comes in. They seek counseling. They go to mediation. The employee office now knows of the claim. There is retaliation that occurs. Under the current process, that employee would have to restart the process again, go back through counseling, go back through mediation.

And this is why we propose the possibility of investigations for our general counsel and the possibility of amending the complaint so that the charges all merge at one point in time, rather than going back through the whole system again.

Ms. SPEIER. So I am also concerned, though, that we don't have a means yet—and possibly should consider this—to allow the employee to work remotely, to the extent that they can. In some offices, you can't. If you work for the Architect and you have to be painting offices, you can't do that remotely. But in offices where you can, so that there is not the continued environment that is very uncomfortable for the victim.

Ms. LETT. May I address that, Congresswoman?

There actually is a way that that can happen. And it has happened in other cases. In the—

Ms. SPEIER. I think we just need to make it explicit, is what I am suggesting. I don't think it has always been the case for everybody. One of the complaints that was filed that went through the process, the employee had to be in the office. And I don't think that is right, personally.

Ms. LETT. I can speak to—I can't speak to specific cases, but, as I said, employing offices have a lot of flexibility in this area. And I think that this is an area where employees have been very effective, because, as soon as we know that an employee has engaged

in protected activity, we will counsel the employing office very strongly that, while the underlying case may not have merit, if the employee is retaliated against in any shape, form, or fashion, I mean, if they even have a thought bubble to retaliate, they are going to face a very difficult case.

And so, I think, we have never lost a case on retaliation because—

Ms. SPEIER. Okay. My time is running out, so I am going to ask a couple more questions.

Ms. LETT. Sure.

Ms. SPEIER. Soft landings. One case that we all are familiar with where the employee, after the settlement, couldn't find a job in the Capitol. I would be interested—maybe we don't have time right now—but some kind of discussion about what we do for employees who have, through no fault of their own, have been sexually harassed, they have come forward, they now have a scarlet letter that they wear and cannot be employed elsewhere.

Ms. GRUNDMANN. Could I answer that question just very quickly?

Under the current law, an employee who has left is still a covered employee up to 180 days from the violation. So, if there was retaliation, if they had left, they could still file a claim for that 180 days.

Ms. SPEIER. Yeah, but what happens if they still want to work in the building?

Ms. GRUNDMANN. Larger policy. Yup.

Ms. SPEIER. Thank you.

I yield back.

The CHAIRMAN. The gentlelady yields back.

The Chair will now recognize the chair of the Ethics Committee, Mrs. Brooks, for 5 minutes.

Mrs. BROOKS. Thank you, Mr. Chairman. And thank you again for allowing me to participate.

I would like to ask permission to admit for the record the letter that Representative Deutch, my ranking member on Ethics, and I submitted that Ms. Grundmann has just referred to, the letter of December 1.

The CHAIRMAN. Without objection.

Susan W. Brooks, Indiana
Chairwoman
 Theodore E. Deutch, Florida
Ranking Member

Patrick Meehan, Pennsylvania
 Trey Gowdy, South Carolina
 Kenny Marchant, Texas
 Leonard Lance, New Jersey

Yvette D. Clarke, New York
 Jared Polis, Colorado
 Anthony Brown, Maryland
 Steve Cohen, Tennessee



ONE HUNDRED FIFTEENTH CONGRESS

U.S. House of Representatives

COMMITTEE ON ETHICS

December 1, 2017

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Staff Director and Chief Counsel

Donna Herbert
Director of Administration

Megan Savage
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Susan Tsui Grundmann, Executive Director
 Office of Compliance
 John Adams Building
 110 2nd Street, SE, Room LA 200
 Washington, DC 20540-1999

Dear Ms. Grundmann:

Sexual harassment and employment discrimination violate a guiding principle for Members of the House of Representatives set forth in the Code of Official Conduct: "A Member, Delegate, Resident Commissioner, officer, or employee of the House shall behave at all times in a manner that shall reflect creditably on the House."

As you know, sexual harassment and employment discrimination are prohibited in the House of Representatives, both by statute and by the Code of Official Conduct (House Rules).¹ The Congressional Accountability Act (CAA) prohibits harassment and discrimination based on race, color, national origin, sex, religion, age, or disability.² The law also prohibits actions that have a "disparate impact" on an employee on the basis of race, color, national origin, sex, or religion, despite appearing neutral in practice.³

In addition to federal law, House Rules have long prohibited discriminatory conduct in employment. House Rules state that "[a] Member . . . may not discharge and may not refuse to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the race, color, religion, sex (including marital or parental status), disability, age, or national origin of such individual . . ."⁴

¹ The Congressional Accountability Act is codified at 2 U.S.C. §§ 1311 *et seq.*; the Code of Official Conduct is codified as House Rule 23.

² Office of Compliance, "Harassment and Discrimination Prohibited," available at <https://www.compliance.gov/act/under-caa/harassment-and-discrimination-prohibited>; see generally 2 U.S.C. §§ 1311 *et seq.*

³ *Id.*

⁴ House Rule 23, clause 9.

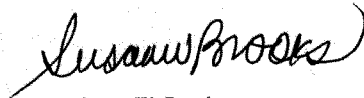
Susan Tsui Grundmann
Page 2

The House Rules authorize the Committee to investigate any alleged violation by a Member, Delegate, Resident Commissioner, officer, or employee of the House "of the Code of Official Conduct or of a law, rule, regulation, or other standard of conduct applicable to the conduct of such Member, Delegate, Resident Commissioner, officer, or employee in the performance of the duties or the discharge of the responsibilities of such individual."⁵ The CAA recognizes this jurisdiction and authority by stating that the House and Senate Ethics Committees "retain full power, in accordance with the authority provided to them by the Senate and the House, with respect to the discipline of Members, officers, and employees for violating rules of the Senate and the House on nondiscrimination in employment."⁶ The CAA also expressly provides that the Office of Compliance may provide the House and Senate Ethics Committees with access to records of its hearings and decisions.⁷

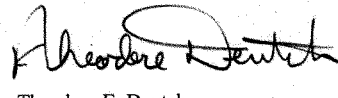
In order to effectuate its constitutional and statutory authority with respect to House Rules, we request that you promptly provide the Committee with all records in the possession of the Office of Compliance related to any claims of sexual harassment, discrimination, retaliation, or any other employment practice prohibited by the CAA involving alleged conduct by any current Member, Delegate, Resident Commissioner, officer, or employee of the House of Representatives.

Thank you for your cooperation. If you have any questions regarding this matter, please contact the Committee's Staff Director and Chief Counsel, Tom Rust, at extension 5-7103.

Sincerely,



Susan W. Brooks
Chairwoman



Theodore E. Deutch
Ranking Member

⁵ House Rule XI, clause 3(a)(2).

⁶ Congressional Accountability Act § 1433.

⁷ 2 U.S.C. § 1416(e).

Mrs. BROOKS. Thank you.

And I would also ask unanimous consent that we admit into the record the Office of Compliance's response that was received this morning that I have been reading this morning.

The CHAIRMAN. Without objection.

[The information follows:]



Office of Compliance

Office of the Executive Director

December 7, 2017

The Honorable Susan Brooks
Chairwoman
United States House of Representatives
Committee on Ethics
1015 Longworth House Office Building
Washington, D.C. 20515

The Honorable Ted Deutch
Ranking Member
United States House of Representatives
Committee on Ethics
1015 Longworth House Office Building
Washington, D.C. 20515

Dear Chairwoman Brooks and Ranking Member Deutch:

Thank you for your letter of December 1, 2017. The Office of Compliance certainly shares your concern that conduct constituting sexual harassment and employment discrimination is in conflict with existing law and the Code of Official Conduct. To my knowledge, as long as the Office of Compliance has been in existence, we have encouraged employees who have been the victim of conduct that may constitute an ethical violation to contact your Committee and to cooperate with any subsequent investigation. However, nothing in the Congressional Accountability Act compels employees to file a complaint with your committee and we wholly lack the statutory authority to file such a complaint with your office based upon information revealed to us during a "strictly confidential" counseling or mediation session or a confidential administrative proceeding.

As you know, under existing law, all counseling and mediation conducted by the Office of Compliance is "strictly confidential" and all administrative proceedings and deliberations are "confidential." See 2 U.S.C. §§ 1416(a), (b) & (c). The Congressional Accountability Act creates a very narrow exception to these statutory confidentiality requirements for your committee. That narrow exception grants me the discretion, after consulting with the individuals who have filed the complaints, to provide your committee with access to "the records of the

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www.compliance.gov

hearing officers and the Board, including all written and oral testimony in the possession of the Office” but only after “a final decision has been entered under section 1405(g) or 1406(e).” See 2 U.S.C. § 1416(e).

In response to your request for records, because the Office of Compliance has not conducted any proceeding before a hearing officer or the Board relating to any current Member, Delegate, Resident Commissioner, officer or employee of the House of Representatives, the Office is not in possession of any record that fits within the narrow statutory exception to confidentiality contained in 2 U.S.C. § 1416(e).

Please feel free to contact me if I may further assist the Committee.

Very truly yours,



Susan Tsui Grundmann
Executive Director

Mrs. BROOKS. Thank you.

In our letter on December 1, we asked that the committee—and because this is a hearing about the process and about examining reforms to the Congressional Accountability Act, that is what I want to zero in on. There are many, many other things I would love to talk about.

However, we asked OOC to promptly provide the committee with all records in the possession of the office related to any claims of sexual harassment, discrimination, retaliation, and so forth.

The response that we received today indicates that—you refer—and I quickly went to section 1416 of confidentiality. As I am reading your response, you cannot share, because of the strict confidentiality rules, any claims that you have been involved in, OOC, relative to referrals to Ethics. Am I correct?

Ms. GRUNDMANN. You are absolutely correct. The way the law is written is the confidentiality, the strict confidentiality, not only binds the parties, it specifically binds our office from discussing those claims.

And you are talking about claims overall. The law currently prohibits us from releasing information regarding in the counseling period, in the mediation period, but allows for a very narrow exception when a case has gone to hearing and a final decision has been rendered and the employee consents.

Mrs. BROOKS. And to that point on the hearing, there was only one hearing in 2016, in fiscal year 2016. Is that correct?

Ms. GRUNDMANN. If that is what is in the letter. I—

Mrs. BROOKS. That is not in the letter. That is on a screen-shot on your website.

Ms. GRUNDMANN. Now, it is possible that that case settled—

Mrs. BROOKS. Okay.

Ms. GRUNDMANN [continuing]. And there was no final decision.

Mrs. BROOKS. There was one that indicated a hearing, but you indicated in this letter that there have been no proceedings before a hearing officer. And the hearing officer comes after mediation. It is the end stage of your process—

Ms. GRUNDMANN. Correct.

Mrs. BROOKS [continuing]. Correct? And you indicate that there have not been any proceedings before a hearing officer or a board relative to any Members or employees.

Ms. GRUNDMANN. Correct. That doesn't cover district court.

Mrs. BROOKS. Okay. That covers the court of appeals.

Ms. GRUNDMANN. It does not cover the court of appeals. It only covers our administrative hearing process before one of our hearing officers.

Mrs. BROOKS. Okay. And so are you saying that there are matters that have gone to district court?

Ms. GRUNDMANN. There are matters that have gone to district court.

Mrs. BROOKS. That you don't have possession of those records?

Ms. GRUNDMANN. We are not part of that process.

Mrs. BROOKS. Okay. And so those people who decide to go to district court, they pursue their own process in district court.

Ms. GRUNDMANN. That is correct.

Mrs. BROOKS. And so we are not getting anything.

Ms. GRUNDMANN. Pardon me?

Mrs. BROOKS. We are not going to receive anything regarding any—and we actually asked about any employment matters. We actually asked related to claims of sexual harassment, discrimination, retaliation, or any employment practice.

Ms. GRUNDMANN. That goes back to the law. The law doesn't allow us to release anything to your committee.

But if we were to change the law, then we could use the method, through investigation by our general counsel, any report that is generated where reasonable cause has been found that the law has been violated could be released to your committee.

Mrs. BROOKS. And so let me ask you, as well as Ms. Lett, what are your opinions on mandatory reporting to the Ethics Committee in harassment matters?

Ms. LETT. I have to say that is a very difficult question to answer. When we handle matters of discrimination and we talk with our clients, we tell our clients that it is possible that we will resolve the case or the case may go forward, but there may also be some type of Ethics matter that might arise out of those circumstances. So they will know that they may be fighting on two fronts, whatever the claim may be.

Mrs. BROOKS. And can I ask, Ms. Grundmann: In your letter, you state to us that you have encouraged employees who have been the victim that may constitute an ethical violation to contact our committee—how do you do that?—and to cooperate with our investigation.

Ms. GRUNDMANN. We do that through the counseling period.

Mrs. BROOKS. And is that just written? It is a written discussion? Or do you provide them that in writing, that they should—

Ms. GRUNDMANN. Counseling is generally by phone or in person. So it is a verbal discussion.

Mrs. BROOKS. And is there any discussion—and I am sorry, my time is up. But my question was, is there any discussion about the confidentiality of the Ethics proceedings, in many ways, not that initial investigations might not be reported, but, in fact, very often the witnesses, the complaining witnesses, are often kept confidential?

Ms. GRUNDMANN. I believe there is.

Mrs. BROOKS. Okay. Thank you.

I yield back.

The CHAIRMAN. The gentlelady yields back.

The Chair will now recognize the gentleman from Alabama, Mr. Byrne, for 5 minutes.

Mr. BYRNE. Thank you, Mr. Chairman. And I appreciate your allowing me to participate in this hearing. It has been very edifying for me.

Mr. Crowley, I want to make sure I clarify one thing with you. I don't think you are saying this, but I want to make sure we get this very clear. You are not saying the Speech or Debate Clause provides immunity to a Member or a Member's office if they engage in sexual harassment.

Mr. CROWLEY. Congressman, that is a very difficult question to answer. Clearly, the conduct itself is not protected. The question becomes what happens when a Member of Congress asserts that a

discriminatory action, which, of course, sexual harassment includes, was not motivated by what the victim says it was—clearly, sexual harassment, under any circumstances——

Mr. BYRNE. But that would not be sexual harassment then.

Mr. CROWLEY. Well, keep in mind that sexual harassment is a form of discrimination under the——

Mr. BYRNE. It is a subset of discrimination based on gender, but sexual harassment cannot be immunized by the United States Constitution.

Mr. CROWLEY. That is correct.

Mr. BYRNE. Okay. I wanted to make sure we got that clear.

Now, I want to move to what we do about it. And I think where we are really touching here is how we investigate and enforce this.

Ms. Grundmann, you do not have the authority to investigate or enforce that today, in sexual harassment.

Ms. GRUNDMANN. That is correct.

Mr. BYRNE. But if it was an OSHA a case, you would.

Ms. GRUNDMANN. That is correct.

Mr. BYRNE. Why would there be a distinction between OSHA cases and sexual harassment cases?

Ms. GRUNDMANN. We have those same questions.

Mr. BYRNE. Okay.

Mr. Crowley, do you want to answer that question?

Mr. CROWLEY. You know, Congressman, the honest answer is I don't recall. I do recall conversations around having the Office of Compliance play a particular role with respect to the ADA and OSHA because it was a case of first impression. These are historic buildings. If there needed to be retrofitting of an elevator shaft, for example, it was a more involved discussion. And so that was the reason that the Office of Compliance was given responsibility in that area. But why it didn't go further, I can't tell you.

Mr. BYRNE. Well, I will say this. A lot of case law occurred in this area after 1995. I mean, we have the Faragher decision from 1998, the Oncale decision. So a lot happened after that time that you wouldn't have known about at the time you were writing it.

So, Ms. Lipnic, let me turn to you. You do have the power, whether it is in regard to people in the private sector or Federal employees that don't work for Congress, you do have the power at the EEOC to both investigate and enforce. Do you think that the Office of Compliance should have similar powers when those sorts of things come up with regard to Members of Congress or people that work for us?

Ms. LIPNIC. The short answer is yes.

Mr. BYRNE. Okay. I like short answers. They are the best.

Ms. LIPNIC. Again, as you well know—and, you know, I thought your testimony from the November hearing was spot-on. Again, this point I keep making, there is the difference between that immediate investigation that has to take place and that corrective action. And then, you know, the investigation at the EEOC is when someone comes to us, and we are investigating, essentially, was there an investigation, what happened internally, what was, you know, the corrective action taken by the company. But someone needs to be doing that.

And, now, it is my understanding from the testimony that I read that the House Employment Counsel plays that first role, in terms of investigating Members' offices. But I think it is certainly worth considering, do you want to have, you know, a third party, essentially, who is not then representing the Members' offices later on in the process, conducting that initial investigation and then also making some determination in terms of liability.

Mr. BYRNE. Here is a really sticky issue. And, Ms. Lett, I am going look at you for this one.

Now, in the private sector, where we don't have public disclosure issues, when we engage in mediation or we engage in settlement discussions and we reach an agreement, it is almost always confidential. Mediation rules require confidentiality, and the settlement agreements, which are contracts, have confidentiality provisions in them because the confidentiality, or the promise of it, helps foster the negotiations, helps foster people coming to a meeting of the minds.

How do we resolve that tension here in the public sector?

Ms. LETT. I wish I had an easy answer for you on that one, Congressman. There is a tension there. Oftentimes, the employees want that confidentiality because they want to go and they want to get other jobs. Certainly, Members of Congress want that confidentiality, because even if a Member or the office has done absolutely nothing wrong, putting that information out into the public can certainly hurt.

So I don't have an easy answer to that question. I certainly will give it some additional thought, but it is a very difficult situation.

Mr. BYRNE. Thank you. Me either.

Thank you, sir. I yield back.

The CHAIRMAN. The gentleman yields back.

I want to thank each of the witnesses for being here today. You have given us some very valuable testimony to consider as we go forward.

And I particularly want to also thank Mrs. Comstock for her work on this. She has been invaluable to this committee and will be as we go forward.

Also, again, I want to thank Representatives Speier and Byrne for your previous testimony here on November 14 and your participation, along with Mrs. Brooks today, as ex-officio members. I appreciate that insight that you have given.

We have a great responsibility as we go forward to get this right and to make sure that we continue with the message that one case of sexual harassment is one too many. How do we make sure that the victim—as Ms. Speier has so eloquently stated, how do we make sure that the victim is protected, with changes that we will consider, when we balance transparency issues with making sure that a victim is not a victim a second time because of any changes that we make. And we want to make sure, with your input, that we make this in the correct way.

It doesn't seem that difficult for Members to remember the golden rule and to treat people with respect. And that will solve a lot of our future problems as we try to clean this up.

I want to remind everyone that members will have 5 legislative days to submit to the Chair additional questions in writing that would be passed on to the witnesses.

If we do that, we would encourage you to answer those as quickly as possible so that those can be made a part of the record.

Without objection, this hearing is adjourned.

[Whereupon, at 12:00 p.m., the committee was adjourned.]